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A TREATISE

ON THE LAW OF

MECHANICS' LIENS

AND

BUILDING CONTRACTS

WITH

ANNOTATED FORMS

BY

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OF THE SAN FRANCISCO BAR

SAN FRANCISCO

BENDER-MOSS COMPANY

LAW PUBLISHERS AND BOOKSELLERS

1910

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FOREWORD.

In this treatise an effort has been made to give the profession an exhaustive—in the territory treated—and practical work on Mechanics' Liens and Building Contracts, with a full set of carefully prepared and annotated forms.

Scope of the work. The subjects mentioned have been exhaustively treated for the jurisdictions covered, to wit, California, Arizona, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, and Wyoming, and the work will be found equally serviceable in other jurisdictions, especially in Kansas, North and South Dakota, and Texas.

Method of treatment. The cases in each jurisdiction have been kept separate, under the appropriate titles, so that one desiring to follow the law of any state from subject to subject may do so without difficulty, thus rendering the work, in a measure, a practical treatise for each and every jurisdiction covered therein.

Subjects discussed. Among other things may be mentioned the eight chapters devoted to the Original Contract; and the chapter on the Effect of the Validity and Invalidity of the Original Contract will be recognized as a new treatment of an important subject. The entire title on Limitations on Liens has been discussed in a manner quite different from that of prior works. The chapter on Owner and Employer and the chapter on Agency, it is believed, have introduced a clearer statement of the peculiar relations existing between the owner and those improving real property than any that has been heretofore published. The chapter on Architect and that on Sureties will be found valuable to those closely in touch with building operations. The law of procedure has likewise received careful treatment.

Many new definitions are given, especially those of "Statutory Original Contract," "Original Contractor," "Materialman," "Subcontractor," "Subcontract," "Extra Work," and the like, where confusion has reigned. And, particu-

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larly, the underlying grand divisions of the statute, to which all points are referred, have been indicated under each appropriate head.

Reconciliation of conflict. An effort has been made to reconcile apparently conflicting decisions, and to show the present value of authorities, as well as divergences from standard doctrine. Where confusion has appeared, it has been the endeavor to indicate the proper course, at all times being careful to distinguish the court's statement from the writer's own opinion. The true rulings announced by the courts are set forth, irrespective of the formal statements of syllabi.

The Table of Correlated Sections of the Statutes of the different states prefixed will be found to be extremely useful to those desiring to compare the statutes and decisions of their own state with those of other states, cross-references being made to the text where the subject is discussed. This table will also be found valuable in tracing authorities decided hereafter.

Part III, consisting of Forms, contains rather those which involve more complicated facts than those which are simple, this being considered more helpful to the practitioner. This part is thoroughly annotated, and cross-references are made therein to the subject-matter in the text where discussed. References are also made to other forms to be found in the reports themselves, thus giving the reader ready access to numerous forms.

The Index has been prepared with care, with a view of rendering it most serviceable to all users of the treatise.

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TABLE OF CORRELATED SECTIONS.

LIST OF ABBREVIATIONS.

CALIFORNIA.

Kerr's Cyc. Code Civ. Proc. Kerr's Cyclopedic Code of Civil Procedure.

ALASKA.

Civ. Code. Civil Code of 1900 (act of Congress June 6, 1900, ch. xxviii; 31 Stats. at Large, ch. dcclxxxvi, p. 321; 3 Gould and Tucker's Notes U. S. Rev. Stats., pp. 224, 337; 1 Fed. Stats. Ann., p. 282).

ARIZONA.

Rev. Stats. 1901. Revised Statutes of 1901, tit. xl, ch. ii.

COLORADO.

3 Mills's Ann. Stats., 2d ed. 3 Mills's Annotated Statutes, second edition (Laws 1899, pp. 261 et seq.).

HAWAII.

Rev. Laws. Revised Laws of 1905, ch. cxl.

IDAHO.

Sess. Laws 1899, p. 147. Session Laws of 1899, p. 147.

MONTANA.

Code Civ. Proc. Code of Civil Procedure, tit. iv.

NEVADA.

Cutting's Comp. Laws. Cutting's Compiled Laws of 1900 (act of March 14, 1875).

NEW MEXICO.

Comp. Laws. Compiled Laws of 1897.

OKLAHOMA.

Rev. & Ann. Stats. Wilson's Revised and Annotated Statutes of 1903 (4817) § 619-(4831) § 633, ch. 66, art. 27.

OREGON.

Bellinger and Cotton's Ann. Codes and Stats. Bellinger and Cotton's Annotated Codes and Statutes.

UTAH.

Rev. Stats. Revised Statutes of 1898, §§ 1372-1400.

WASHINGTON.

Pierce's Code. Pierce's Washington Code.

WYOMING.

Rev. Stats. Revised Statutes of 1899.

This table may be used to advantage by attorneys who prefer to trace the decisions of their own courts under each appropriate head, and to examine the allied decisions of other jurisdictions. It will also be found convenient in tracing cases decided hereafter. The table is arranged alphabetically, by subjects.

ABANDONMENT OR BREACH OF CONTRACT BY CONTRACTOR. AMOUNT APPLICABLE TO LIENS.

Kerr's Cyc. Code Civ. Proc., § 1200. (§§ 358 et seq., post.)

Colorado. See 3 Mills's Ann. Stats., 2d ed., § 2868.
Utah. See Rev. Stats., § 1374.

AGENCY FOR OWNER. MINES.

Kerr's Cyc. Code Civ. Proc., § 1183. (§ 578, post.)

Alaska. See Civ. Code, § 262.
Idaho. Sess. Laws 1899, p. 147.
Nevada. Cutting's Comp. Laws, § 3881.

AGENCY FOR OWNER. STRUCTURE.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 572 et seq., post.)

Alaska. Civ. Code, § 262.
Arizona. Rev. Stats. 1901, § 2906.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2867.
Idaho. Sess. Laws 1899, p. 147, § 1.
Nevada. Cutting's Comp. Laws, § 3881.
New Mexico. Comp. Laws, § 2217. See Comp. Laws, § 2304.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5640.
Utah. Rev. Stats., § 1372.
Washington. Pierce's Code, § 6102, as amended Laws 1905, ch. cxvi.
Wyoming. Rev. Stats., § 2907.

ALTERATION OF ORIGINAL CONTRACT.

Kerr's Cyc. Code Civ. Proc., § 1184. (§§ 268, 326 et seq., post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868.
Utah. Rev. Stats., §§ 1374, 1376 (payments).

AMENDMENT OF CLAIM OR STATEMENT.

(§ 415, post.)

Oklahoma. Rev. & Ann. Stats., (4821) § 623.
Washington. Pierce's Code, § 6106.

APPEALS.

Kerr's Cyc. Code Civ. Proc., § 1199. (§§ 956 et seq., post.)

Montana. Code Civ. Proc., § 2137.
New Mexico. See Laws 1907, p. 105.

ASSIGNEES.

(§§ 588 et seq., post.)

Arizona. Rev. Stats. 1901, § 2912.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2883.
Nevada. Cutting's Comp. Laws, § 3897.
Oklahoma. Rev. & Ann. Stats., (4820) § 622.
Utah. Rev. Stats., § 1396.
Washington. Pierce's Code, § 6108. See Pierce's Code, § 6106.

ATTORNEYS' FEES AND COSTS.

Kerr's Cyc. Code Civ. Proc., § 1195. (§§ 935 et seq., post.)

Alaska. Civ. Code, § 270.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2882.
Idaho. Sess. Laws 1899, p. 150, § 12.
Nevada. Cutting's Comp. Laws, § 3892, as amended Stats. 1903, p. 51.
New Mexico. Comp. Laws, § 2229.
Oklahoma. Rev. & Ann. Stats. (4825), § 627.
Oregon. 2 Bellinger and Cotton's Ann. Codes and Stats., § 5648 (structures); § 5666 (improving land); § 5672, as amended Gen. Laws 1907, p. 295 (mines).
Utah. Rev. Stats., § 1400.
Washington. Pierce's Code, § 6113.
Wyoming. Rev. Stats., § 2897.

BOND OF CONTRACTOR TO BE FILED. PENALTIES.

Kerr's Cyc. Code Civ. Proc., § 1203. (§§ 281 et seq., and §§ 605 et seq., post.)

Oklahoma. Rev. & Ann. Stats., (4829) § 631, (4830) § 632, (4831) § 633.
Washington. Pierce's Code, § 6102, as amended Laws 1905, ch. cxvi.

CLAIM OF LIEN. AGAINST TWO OR MORE IMPROVEMENTS.

Kerr's Cyc. Code Civ. Proc., § 1188. (§§ 368, 406, 407, 447 et seq., post.)

Colorado. See 3 Mills's Ann. Stats., 2d ed., § 2869.
Idaho. Sess. Laws 1899, p. 148, § 7.
Nevada. Cutting's Comp. Laws, § 3886.
New Mexico. Comp. Laws, § 2222.
Utah. Rev. Stats., § 1387.
Washington. Pierce's Code, § 6109.

CLAIM OF LIEN AGAINST TWO OR MORE IMPROVEMENTS. PRIORITIES.

Kerr's Cyc. Code Civ. Proc., § 1188. (§§ 502, 503 et seq., post.)

Idaho. Sess. Laws 1899, p. 152, § 7.

Nevada. Cutting's Comp. Laws, § 3886.

New Mexico. Comp. Laws, § 2222.

Washington. Pierce's Code, § 6109.

CLAIM OF LIEN. CONTENTS.

Kerr's Cyc. Code Civ. Proc., § 1187. (§§ 370 et seq., post.)

Alaska. Civ. Code, § 266.

Arizona. Rev. Stats. 1901, § 2889 (contract or itemized account); Rev. Stats. 1901, § 2891 (description); Rev. Stats. 1901, § 2898 (attested account).

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2875.

Hawaii. Rev. Laws, § 2174.

Idaho. Sess. Laws 1899, p. 148, § 6.

Montana. See Code Civ. Proc., § 2131, as amended Laws 1901, p. 162 (account).

Nevada. Cutting's Comp. Laws, § 3885, as amended Stats. 1903, p. 51.

New Mexico. Comp. Laws, § 2221.

Oklahoma. Rev. and Ann. Stats., (4818) § 620, (4819) § 621.

Oregon. 2 Bellinger and Cotton's Ann. Codes and Stats., § 5644 (structures); § 5664 (improving land); § 5669, as amended Gen. Laws 1907, p. 295 (mines).

Utah. Rev. Stats., § 1386. See Rev. Stats., §§ 1388, 1399.

Washington. Pierce's Code, § 6106.

Wyoming. Rev. Stats., §§ 2871, 2872, 2879 (mines); § 2893 (structures).

CLAIM OF LIEN, OR STATEMENT. MANNER OF RECORDING. FEES.

Kerr's Cyc. Code Civ. Proc., § 1189. (§§ 416 et seq., post.)

Alaska. Civ. Code, § 267.

Arizona. Rev. Stats. 1901, § 2889 (contract or itemized account); § 2890 (verbal contract).

Hawaii. Rev. Laws, § 2175.

Idaho. Sess. Laws 1899, p. 152, § 9.

Montana. Code Civ. Proc., § 2131, as amended Laws 1901, p. 162 (account); Code Civ. Proc., § 2132.

Nevada. Cutting's Comp. Laws, § 3887.

New Mexico. Comp. Laws, § 2223.

CLAIM OF LIEN, OR STATEMENT. MANNER OF RECORDING. FEES. (Continued.)

Oklahoma. Rev. & Ann. Stats., (4818) § 620, (4819) § 621.

Oregon. 2 Bellinger and Cotton's Ann. Codes and Stats., § 5645 (structures); § 5665; § 5670, as amended Gen. Laws 1907, p. 296 (mines).

Utah. Rev. Stats., § 1389.

Washington. Pierce's Code, § 6107.

Wyoming. Rev. Stats., §§ 2871, 2872, 2879, 2881 (mines); § 2894 (structures).

CLAIM OF LIEN, OR STATEMENT. TIME OF FILING FOR RECORD.

Kerr's Cyc. Code Civ. Proc., § 1187. (§§ 422 et seq., post.)

Alaska. Civ. Code, § 266.

Arizona. Rev. Stats. 1901, §§ 2889, 2898 (contract or account).

Idaho. See Sess. Laws 1899, p. 148, § 6; p. 151, § 5.

Montana. Code Civ. Proc., § 2133.

Nevada. Cutting's Comp. Laws, § 3885, as amended Stats. 1903, p. 51.

New Mexico. Comp. Laws, § 2221.

Oklahoma. Rev. & Ann. Stats., (4818) § 620, (4819) § 621.

Oregon. 2 Bellinger and Cotton's Ann. Codes and Stats., § 5669, as amended Gen. Laws 1907, p. 295 (mines). See § 5664.

Utah. Rev. Stats., § 1386. See § 1388.

Washington. Pierce's Code, § 6106.

Wyoming. Rev. Stats., §§ 2871, 2872 (mines).

CLAIM OF LIEN. STATUTORY COMPLETION FOR PURPOSE OF FILING.

Kerr's Cyc. Code Civ. Proc., § 1187. (§§ 348 et seq., and §§ 422 et seq., post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2875.

CONSOLIDATION OF ACTIONS.

Kerr's Cyc. Code Civ. Proc., § 1195. (§§ 869 et seq., post.)

Alaska. Civ. Code, § 292.

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2877.

Idaho. Sess. Laws 1899, p. 150, § 12.

Nevada. Cutting's Comp. Laws, § 3892, as amended Stats. 1903, p. 51.

New Mexico. Comp. Laws, § 2229.

Oklahoma. Rev. & Ann. Stats., (4823) § 625.

CONSPIRACY TO MAKE CONTRACT PRICE APPEAR LESS.

Kerr's Cyc. Code Civ. Proc., § 1202. (§ 314, post.)

CONSTRUCTION OF STATUTE.

Kerr's Cyc. Code Civ. Proc., §§ 4, 1183, 1184. (§§ 24-27, post.)

Washington. Pierce's Code, § 6119.

CONTRACTOR LIABLE TO OWNER FOR EXCESSIVE LIEN PAYMENTS.

Kerr's Cyc. Code Civ. Proc., § 1193. (§§ 64, 510 et seq., post.)

Alaska. Civ. Code, § 272.
Arizona. Rev. Stats. 1901, § 2901.
Nevada. Cutting's Comp. Laws, § 3890.
New Mexico. Comp. Laws, § 2227.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5650.
Washington. Pierce's Code, § 6111.
Wyoming. Rev. Stats., § 2906.

CONTRACTOR TO DEFEND LIEN SUITS.

Kerr's Cyc. Code Civ. Proc., § 1193. (§§ 64, 510 et seq., post.)

Alaska. Civ. Code, § 272.
Arizona. Rev. Stats. 1901, § 2901.
Idaho. Sess. Laws 1899, p. 148, § 10.
Nevada. Cutting's Comp. Laws, § 3890.
New Mexico. Comp. Laws, § 2227.
Oklahoma. Rev. & Ann. Stats., (4822) § 624.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5650.
Washington. Pierce's Code, § 61[illegible].
Wyoming. Rev. Stats., § 2906.

COSTS.

Kerr's Cyc. Code Civ. Proc., § 1195. (§§ 936 et seq., post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2882.
Idaho. Sess. Laws 1899, p. 150, § 12.
Nevada. Cutting's Comp. Laws, § 3892, as amended Stats. 1903, p. 51.
New Mexico. Comp. Laws, § 2229.
Oklahoma. Rev. & Ann. Stats., (4822) § 624, (4826) § 628.
Utah. Rev. Stats., § 1394.

COUNTERCLAIMS.

Kerr's Cyc. Code Civ. Proc., § 1184. (§§ 515, 516, post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868.

Utah. Rev. Stats., § 1375.

DEFICIENCY JUDGMENT.

Kerr's Cyc. Code Civ. Proc., § 1194. (§§ 922 et seq., post.)

Alaska. See Civ. Code, § 270.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5648 (structures); § 5672, as amended Gen. Laws 1907, p. 296 (mine).

Utah. Rev. Stats., § 1393.

Washington. Pierce's Code, § 6113.

EFFECT OF NON-CONFORMITY OF CONTRACT AND ALTERATIONS.

Kerr's Cyc. Code Civ. Proc., § 1184. (§§ 271, 319 et seq., post.)

EMPLOYER WITHHOLDING MONEYS UPON NOTICE.

Kerr's Cyc. Code Civ. Proc., § 1184. (§§ 547 et seq., post.)

Arizona. Rev. Stats. 1901, § 2901.

Hawaii. See Rev. Laws, § 2178.

EXTENT OF LIEN. INTEREST OF EMPLOYER SUBJECT TO LIEN.

Kerr's Cyc. Code Civ. Proc., § 1185. (§§ 459 et seq., post.)

Alaska. Civ. Code, § 263.

Arizona. Rev. Stats. 1901, § 2906.

Colorado. 3 Mills's Ann. Stats., 2d ed., §§ 2869, 2871.

Hawaii. Rev. Laws, § 2173.

Idaho. Sess. Laws 1899, p. 148, § 4.

Montana. Code Civ. Proc., § 2133.

Nevada. Cutting's Comp. Laws, § 3883.

New Mexico. Comp. Laws, § 2219.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5641.

Utah. Rev. Stats., § 1372; § 1382 (mines).

Washington. Pierce's Code, § 6103, as amended Laws 1905, ch. cxvi.

Wyoming. See Rev. Stats., § 2873 (mines); §§ 2890, 2909.

EXTENT OF LIEN. INCORPOREAL RIGHTS.

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2873.

Utah. Rev. Stats., § 1377.

EXTENT OF LIEN. LEASEHOLD INTEREST.

(§ 467, post.)

Alaska. Civ. Code, § 263.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2870a.
Montana. See Code Civ. Proc., § 592, as amended Laws 1899, p. 124; § 2134.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5641 (structure); § 5668, as amended Gen. Laws 1907, p. 293 (mine).
Utah. Rev. Stats., § 1372; § 1382 (mines).
Wyoming. Rev. Stats., §§ 2892, 2909.

EXTENT OF LIEN. FOR VALUE.

Kerr's Cyc. Code Civ. Proc., § 1184. (§ 456, post.)

Arizona. Rev. Stats. 1901, § 2898.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868.
Hawaii. Rev. Laws, § 2173.
Utah. Rev. Stats., § 1372.

EXTENT OF LIEN LIMITED BY CONTRACT PRICE.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 452 et seq., post.)

Alaska. Civ. Code, § 272.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2867.
Idaho. Sess. Laws 1899, p. 148, § 10.
Oklahoma. Rev. & Ann. Stats., (4819) § 621.
Utah. Rev. Stats., § 1373.

EXTENT OF LIEN. MINING MACHINERY AS FIXTURES.

Kerr's Cyc. Code Civ. Proc., § 1192 (1907). (§§ 445, 185 et seq., post.)

Arizona. See Rev. Stats. 1901, § 2906.
Colorado. See 3 Mills's Ann. Stats., 2d ed., § 2870a.

EXTENT OF LIEN. TERRITORIAL. MINES.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 443 et seq., post.)

Alaska. Civ. Code, § 263.
Arizona. Rev. Stats. 1901, § 2906.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2870.
Utah. Rev. Stats., § 1381.

EXTENT OF LIEN. TERRITORIAL. STRUCTURE.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 438 et seq., post.)

Alaska. Civ. Code, § 263.
Arizona. Rev. Stats. 1901, § 2888; § 2893 (outside city); § 2894 (in city).

EXTENT OF LIEN. TERRITORIAL. STRUCTURE. (Continued.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2869.
Hawaii. See Rev. Laws, § 2173.
Idaho. Sess. Laws 1899, p. 148, § 4.
Montana. Code Civ. Proc., § 2133.
Nevada. Cutting's Comp. Laws, § 3883.
New Mexico. Comp. Laws, § 2219.
Oklahoma. Rev. & Ann. Stats., (4817) § 619.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5641.
Utah. Rev. Stats., § 1379.
Washington. Pierce's Code, § 6103, as amended Laws 1905, ch. cxvi.
Wyoming. Rev. Stats., §§ 2889, 2890.

EXTENT OF LIEN. TERRITORIAL. STRUCTURES. LAND FOR CONVENIENT USE AND OCCUPATION.

Kerr's Cyc. Code Civ. Proc., § 1185. (§§ 440 et seq., post.)
Alaska. Civ. Code, § 263.
Idaho. Sess. Laws 1899, p. 148, § 4.
New Mexico. Comp. Laws, § 2219.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5641.
Utah. Rev. Stats., § 1379.

FORFEITURE OF LIEN.

Kerr's Cyc. Code Civ. Proc., § 1202. (§§ 632 et seq., post.)

FORUM.

(§§ 651 et seq., post.)

Alaska. Civ. Code, § 270.
Arizona. Rev. Stats. 1901, § 2897.
Idaho. Sess. Laws 1903, p. 95, amending Rev. Stats., § 3841 (Sess. Laws 1899, p. 150, § 15).
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5648 (structures); § 5672 (mines).
Wyoming. Rev. Stats., § 2885 (mines).

HOMESTEAD.

Kerr's Cyc. Code Civ. Proc., § 1241. (§§ 37, 493 et seq., post.)
Nevada. Cutting's Comp. Laws, § 550.
Oklahoma. Rev. & Ann. Stats., (4817) § 619.
Wyoming. Rev. Stats., § 2901.

JOINDER OF LIEN CLAIMANTS AS PLAINTIFFS.

(See tit. "Parties.")

Kerr's Cyc. Code Civ. Proc., § 1195. (§§ 659 et seq., post.)

Alaska. Civ. Code, § 292.

Arizona. Rev. Stats. 1901, § 2910.

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2877.

Idaho. See Sess. Laws 1899, p. 148, § 12.

Montana. Code Civ. Proc., § 2138.

Nevada. Cutting's Comp. Laws, § 3892, as amended Stats. 1903, p. 51.

New Mexico. Comp. Laws, § 2229.

Washington. See Pierce's Code, § 6106.

LABOR, NATURE OF. GRADING, ETC., WORK.

Kerr's Cyc. Code Civ. Proc., § 1191. (§§ 156 et seq., post.)

Alaska. Civ. Code, § 269.

Idaho. Sess. Laws 1899, p. 147, § 3.

Montana. Code Civ. Proc., § 2130.

Nevada. Cutting's Comp. Laws, § 3882.

New Mexico. Comp. Laws, § 2218.

Oregon. See Bellinger and Cotton's Ann. Codes and Stats., §§ 5647, 5663.

Washington. Pierce's Code, § 6104.

LABOR, NATURE OF. MINES.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 149 et seq., post.)

Alaska. Civ. Code, §§ 262, 274.

Arizona. Rev. Stats. 1901, §§ 2904, 2906.

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2870.

Idaho. Sess. Laws 1899, p. 147, § 1.

Montana. Code Civ. Proc., § 2130.

Nevada. Cutting's Comp. Laws, § 3881.

New Mexico. Comp. Laws, § 2217.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5668, as amended Gen. Laws 1907, p. 293.

Utah. Rev. Stats., § 1381.

Washington. Pierce's Code, § 6102, as amended Laws 1905, ch. cxvi.

Wyoming. Rev. Stats., §§ 2868, 2869, 2875, 2888.

LABOR, NATURE OF. STRUCTURES.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 130 et seq., post.)

Alaska. Civ. Code, §§ 262, 274.

Arizona. Rev. Stats. 1901, §§ 2888, 2898; § 2902 (railroad).

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2867.

LABOR, NATURE OF. STRUCTURES. (Continued.)

Hawaii. Rev. Laws, § 2173.

Idaho. Sess. Laws 1899, p. 147, § 1.

Montana. Code Civ. Proc., § 2130.

Nevada. Cutting's Comp. Laws, §§ 3881, 3899.

New Mexico. Comp. Laws, § 2217.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5640, 5652.

Utah. Rev. Stats., §§ 1372, 1397.

Washington. Pierce's Code, § 6102, as amended Laws 1905, ch. cxvi.

Wyoming. Rev. Stats., § 2889.

LIABILITY OF CONTRACTOR FOR SUBLIEN JUDGMENTS AGAINST OWNER.

Kerr's Cyc. Code Civ. Proc., § 1193. (§§ 64, 511 et seq., post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868. The statute uses the expression "principal contractor."

Idaho. Sess. Laws 1899, p. 148, § 10.

LIABILITY OF CONTRACTOR FOR SUBLIENS.

Kerr's Cyc. Code Civ. Proc., § 1193. (§§ 64, 511 et seq., post.)

LIMITATION FOR COMMENCING ACTIONS.

Kerr's Cyc. Code Civ. Proc., § 1190. (§§ 649 et seq., post.)

Alaska. Civ. Code, § 268.

Arizona. Rev. Stats. 1901, § 2909.

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2876.

Idaho. Sess. Laws 1899, p. 148, § 9.

Montana. Code Civ. Proc., § 2139.

Nevada. Cutting's Comp. Laws, § 3888.

New Mexico. Comp. Laws, § 2224.

Oklahoma. Rev. & Ann. Stats., (4821) § 623, (4826) § 628.

Oregon. 2 Bellinger and Cotton's Ann. Codes and Stats., § 5646 (structures); § 5667 (improving land); § 5671, as amended Gen. Laws 1907, p. 296 (mines).

Utah. Rev. Stats., § 1390.

Washington. Pierce's Code, § 6110.

Wyoming. Rev. Stats., § 2874 (mines); § 2902 (structures).

MATERIALS EXEMPT FROM PROCESS. EXCEPTION FOR PURCHASE PRICE.

Kerr's Cyc. Code Civ. Proc., § 1196. (§ 647, post.)

Alaska. Civ. Code, § 273.

Idaho. Sess. Laws 1899, p. 150, § 13.

MATERIALS EXEMPT FROM PROCESS. EXCEPTION FOR PURCHASE PRICE. (Continued.)

Nevada. Cutting's Comp. Laws, § 3893.
New Mexico. Comp. Laws, § 2230.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5651.
Utah. Rev. Stats., § 1395.
Washington. Pierce's Code, § 6116.

MISTAKES NOT TO FORFEIT LIEN.

Kerr's Cyc. Code Civ. Proc., § 1203a (1907). (§§ 412 et seq., and §§ 632 et seq., post.)

Colorado. See 3 Mills's Ann. Stats., 2d ed., § 2875.
Montana. Code Civ. Proc., § 2131, as amended Laws 1901, p. 112.

NEW TRIAL.

Kerr's Cyc. Code Civ. Proc., § 1199. (§ 877, post.)

Montana. Code Civ. Proc., § 2137.

NOTICE BY CONTRACTOR TO OWNER. OBJECTION TO ACCOUNT.

Kerr's Cyc. Code Civ. Proc., § 1202. (§§ 632 et seq., 796 post.)

Arizona. Rev. Stats. 1901, § 2900.
Wyoming. Rev. Stats., § 2877 (mines).

NOTICE OF COMPLETION, OR CESSATION FROM LABOR.

Kerr's Cyc. Code Civ. Proc., § 1187. (§§ 425 et seq., post.)

NOTICE OF NON-RESPONSIBILITY UPON KNOWLEDGE OF IMPROVEMENT. STRUCTURES AND MINING CLAIMS.

Kerr's Cyc. Code Civ. Proc., § 1192 (1907). (§§ 469 et seq., post.)

Alaska. Civ. Code, § 265.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2871.
Nevada. Cutting's Comp. Laws, § 3889.
New Mexico. Comp. Laws, § 2226.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5643 (structures); § 5668, as amended Gen. Laws 1907, p. 293, §§ 1, 6 (mines).

NOTICE BY OWNER AS TO CONDITIONS UNDER WHICH WORK IS DONE.

Idaho. Act approved March 14, 1899.
Utah. Rev. Stats., § 1375.

NOTICE TO OWNER. CONTENTS. SERVICE.

Kerr's Cyc. Code Civ. Proc., § 1184. (§§ 547 et seq., post.)

Arizona. Rev. Stats. 1901, §§ 2890, 2899.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868.
Hawaii. Rev. Laws, § 2174.
Oklahoma. See Rev. and Ann. Stats., (4819) § 621.
Wyoming. See Rev. Stats., § 2876 (mines).

OBJECT OF LABOR. GRADING, ETC.

Kerr's Cyc. Code Civ. Proc., § 1191. (§ 184, post.)

Alaska. Civ. Code, § 269.
Arizona. Rev. Stats. 1901, § 2905.
Idaho. Sess. Laws 1899, p. 147, § 3.
Montana. Code Civ. Proc., § 2130.
Nevada. Cutting's Comp. Laws, § 3882.
New Mexico. Comp. Laws, § 2218.
Oklahoma. See Rev. & Ann. Stats., (4817) § 619.
Oregon. See Bellinger and Cotton's Ann. Codes and Stats., §§ 5647, 5663.
Washington. Pierce's Code, § 6104.

OBJECT OF LABOR. MINES.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 182 et seq., post.)

Alaska. Civ. Code, §§ 262, 274.
Arizona. Rev. Stats. 1901, §§ 2904, 2906.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2870.
Idaho. Sess. Laws 1899, p. 147, § 1.
Montana. Code Civ. Proc., § 2130.
Nevada. Cutting's Comp. Laws, § 3881.
New Mexico. Comp. Laws, § 2217.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5668, as amended Gen. Laws 1907, p. 293.
Utah. Rev. Stats., § 1381.
Washington. Pierce's Code, § 6102, as amended Laws 1905, ch. cxvi.
Wyoming. Rev. Stats., §§ 2868, 2869, 2875, 2884.

OBJECT OF LABOR. STRUCTURES.

Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 166 et seq., post.)

Alaska. Civ. Code, §§ 262, 274.
Arizona. Rev. Stats. 1901, §§ 2888, 2898; § 2902 (railroad); § 2903.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2867.
Hawaii. Rev. Laws, § 2173.
Idaho. Sess. Laws 1899, p. 147, §§ 1, 2.
Montana. Code Civ. Proc., § 2130.

OBJECT OF LABOR. STRUCTURES. (Continued.)

Nevada. Cutting's Comp. Laws, §§ 3881, 3899.
New Mexico. Comp. Laws, § 2217.
Oklahoma. Rev. & Ann. Stats., (4817) § 619.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5640, 5652.
Utah. Rev. Stats., §§ 1372, 1397.
Washington. Pierce's Code, § 6102, as amended Laws 1905, ch. cxvi.
Wyoming. Rev. Stats., § 2889.

ORIGINAL CONTRACTOR. DEFINITION OF.

Kerr's Cyc. Code Civ. Proc., §§ 1183, 1184, 1193, 1201. (§§ 45 et seq., post.)

Utah. Rev. Stats., § 1383.

OWNER, DEFINITION OF.

(§§ 508 et seq., post.)

Montana. Code Civ. Proc., § 2140.
Wyoming. Rev. Stats., § 2907.

OWNER, ACTION BY, AGAINST CLAIMANTS.

Kerr's Cyc. Code Civ. Proc., § 1184. (§§ 644, 871 et seq., post.)

Oklahoma. Rev. & Ann. Stats., (4826) § 628.

OWNER DEDUCTING FROM CONTRACTOR SUBLIEN JUDGMENTS.

Kerr's Cyc. Code Civ. Proc., § 1193. (§ 511, post.)

Alaska. Civ. Code, § 272.
Arizona. Rev. Stats. 1901, § 2901.
Colorado. See 3 Mills's Ann. Stats., 2d ed., § 2868.
Idaho. Sess. Laws 1899, p. 148, § 10.
Nevada. Cutting's Comp. Laws, § 3890.
New Mexico. Comp. Laws, § 2227.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5650.
Washington. Pierce's Code, § 6111.
Wyoming. Rev. Stats., § 2906.

OWNER WITHHOLDING CONTRACT PRICE.

Kerr's Cyc. Code Civ. Proc., § 1193. (§ 514, post.)

Alaska. Civ. Code, § 272.
Arizona. Rev. Stats. 1901, § 2898.
Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868.
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OWNER WITHHOLDING CONTRACT PRICE. (Continued.)

Idaho. Sess. Laws 1899, p. 148, § 10.
Nevada. Cutting's Comp. Laws, § 3890.
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Oklahoma. Rev. & Ann. Stats., (4819) § 621, (4822) § 624.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5650.
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Wyoming. Rev. Stats., §§ 2876, 2878 (mines); § 2906. (structures).

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Kerr's Cyc. Code Civ. Proc., § 1195. (§§ 659 et seq., post.)

Alaska. Civ. Code, § 270.
Colorado. 3 Mills's Ann. Stats., 2d ed., §§ 2877, 2881.
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Oklahoma. Rev. & Ann. Stats., (4822) § 624, (4826) § 628.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5648 (structures); § 5672, as amended Gen. Laws 1907, p. 296 (mines).
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Kerr's Cyc. Code Civ. Proc., § 1184. (§ 280, post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868.
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(§§ 254 et seq., and §§ 502 et seq., post.)

Alaska. Civ. Code, § 271.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5649.

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Kerr's Cyc. Code Civ. Proc., §§ 1197, 1203. (§§ 73, 638 et seq., post.)
Kerr's Cyc. Code Civ. Proc., § 1197. (§§ 638, 914 et seq., post.)
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Idaho. Sess. Laws 1899, p. 150, § 14.

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Kerr's Cyc. Code Civ. Proc., § 1191. (§§ 42 et seq., post.)

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Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 42 et seq., post.)

Alaska. Civ. Code, § 262.
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Colorado. 3 Mills's Ann. Stats., 2d ed., § 2870.
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Kerr's Cyc. Code Civ. Proc., § 1198. (§§ 864 et seq., post.)

Alaska. Civ. Code, § 270.

Arizona. Rev. Stats. 1901, §§ 2910, 2913.

Colorado. See 3 Mills's Ann. Stats., 2d ed., §§ 2877, 2878, 2879, 2881, 2886.

Hawaii. Rev. Laws, § 2177.

Idaho. Sess. Laws 1899, p. 150, § 15.

Montana. Code Civ. Proc., § 2136.

Nevada. Cutting's Comp. Laws, § 3895; Stats. 1907, ch. xc, § 2, act approved March 20, 1907.

New Mexico. Comp. Laws, § 2225 (summons).

Oklahoma. Rev. & Ann. Stats., (4821) § 623.

Oregon. 2 Bellinger and Cotton's Ann. Codes and Stats., § 5648 (structures); § 5666 (improving land); § 5672, as amended Gen. Laws 1907, p. 296 (mines).

Utah. Rev. Stats., § 1391.

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Alaska. Civ. Code, § 270.

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2879.

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Kerr's Cyc. Code Civ. Proc., § 1184. (§§ 269 et seq., and § 563, post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2868.

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Utah. Rev. Stats., § 1374. See § 1378.

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Kerr's Cyc. Code Civ. Proc., § 1186. (§§ 486 et seq., post.)

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Hawaii. Rev. Laws, § 2176.

Idaho. Sess. Laws 1899, p. 148, § 5.

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Nevada. Cutting's Comp. Laws, § 3884, as amended March 14, 1899 (§ 4, act March 2, 1875).

New Mexico. Comp. Laws, § 2220.

Oklahoma. Rev. & Ann. Stats., (4817) § 619, (4824) § 626.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5642 (structures); § 5671, as amended Gen. Laws 1907, p. 296 (mines).

Utah. Rev. Stats., §§ 1380, 1384, 1385.

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Kerr's Cyc. Code Civ. Proc., § 1196. (§§ 645 et seq., post.)

Hawaii. Rev. Laws, § 2177.

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Kerr's Cyc. Code Civ. Proc., § 1194. (§§ 504 et seq., post.)

Alaska. Civ. Code, § 270.

Arizona. Rev. Stats. 1901, § 2911.

Colorado. 3 Mills's Ann. Stats., 2d ed., §§ 2869, 2874.

Hawaii. Rev. Laws, § 2176.

Idaho. Sess. Laws 1899, p. 148, § 11.

Montana. Code Civ. Proc., § 2133.

Nevada. Cutting's Comp. Laws, § 3891.

New Mexico. Comp. Laws, § 2228.

Oklahoma. Rev. & Ann. Stats., (4827) § 629.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5648 (structures); § 5672, as amended Gen. Laws 1907, p. 296 (mines).

Utah. Rev. Stats., §§ 1385, 1391.

Washington. Pierce's Code, § 6113.

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RECORDING LEASE OR CONTRACT. MINE.

Kerr's Cyc. Code Civ. Proc., § 1192 (1907).

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5668, as amended Gen. Laws 1907, p. 293.

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Kerr's Cyc. Code Civ. Proc., §§ 681 et seq., and § 1189. (§§ 948 et seq., post.)

Alaska. Civ. Code, § 293.

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2880.

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(§§ 16, 188, 190, 948 et seq., post.)

Alaska. Civ. Code, § 264.
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Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5641, 5642.
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(§§ 634 et seq., post.)

Colorado. 3 Mills's Ann. Stats., 2d ed., § 2884.
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Alaska. Civ. Code, § 275.
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Kerr's Cyc. Code Civ. Proc., § 1183 (§§ 370 et seq., post.)

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Kerr's Cyc. Code Civ. Proc., § 1183. (§§ 214, 269 et seq., post.)

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PART I.

SUBSTANTIVE LAW, OR PRIMARY RIGHTS.

CHAPTER I.

HISTORY, SPIRIT, NATURE, AND CONSTRUCTION OF THE LAW.

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§ 2. General divisions of subject. California statute distinguished.
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§ 1. Introductory. There is, perhaps, no other subject in the wide domain of the law which requires more careful

study of statutes and decisions of one's own state than that of mechanics' liens. Mr. Stimson [1] says: "There is no subject in the statute-book upon which there is more general and frequent amendment and revision than this. Since the original edition of this work, nearly half of the states in the Union have either patched up their old statutes [relating to and regulating mechanics' liens] or adopted entirely new ones, all of which are complex, elaborate, and far from clear. It seems hardly worth while to occupy much space with a detailed statement of these changes, which, after all, concern a subject of merely local importance." [2] And that diligent investigator was compelled to admit the practical difficulty of bringing order out of this statutory chaos.

It it obvious that, under such circumstances, the decisions of other states, rendered upon a view of the entire statute on this subject, and not upon that of a segregated portion, will in many cases throw but little light upon the problem. Indeed, the practising attorney will, by reason of the many changes in the statute, often find it difficult to reconcile the apparently conflicting decisions, and ascertain the exact condition of the expressed law in his own state. The supreme court of California, adverting to this difficulty, has said: "It must be remembered that the mechanic's-lien law of this state has been changed at nearly every session of the legislature since the first statute on the subject was passed, and that many former decisions of this court in relation to it rested upon provisions not now in existence." [3]

The only safe course for the practitioner to follow is to read and weigh each decision in connection with the letter of the statute in force at the time the particular decision was rendered.

[1] American Statute Law, 1st Suppl., p. 30.

[2] For an admirable illustration of the technicality of the subject, see Palmer v. Lavigne, 104 Cal. 30, 31, 37 Pac. Rep. 775.

Washington. See Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 129, 32 Pac. Rep. 1073.

[3] Booth v. Pendola, 88 Cal. 36, 44, 23 Pac. Rep. 200, 25 Id. 1101.

Colorado. See Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

Oregon. See Tatum v. Cherry, 12 Oreg. 135.

§ 2. General divisions of subject. California statute distinguished. In the California mechanic's-lien law there are three classes of subjects or work, etc., for which liens are provided, running through the statute.[4] These are: 1. Liens upon "structures," under section eleven hundred and eighty-three; 2. Liens upon mining claims and mines, under the provisions of the same section; and 3. Liens for street-work, etc., under the provisions of section eleven hundred and ninety-one. Some of the provisions of the code regarding mechanics' liens have been held to be applicable to one or another of the classes above named, but not to all. This fact is, perhaps, one of the greatest sources of uncertainty and confusion in construing and applying the California statute.

Other states have avoided these difficulties, or some of them, by passing separate laws governing the three classes of liens above enumerated as being provided for in one statute under the California mechanic's-lien law.

§ 3. Questions raised in the decisions. The courts, in passing upon the subject-matter of the state's mechanic's-lien law, raise the following questions, among others: 1. Is the lien given primarily upon the structure or upon the land?[4a] 2. Is the lien upon the land and appurtenances or upon the fund? 3. Is the lien limited by the original contract price? or is it direct, either for the value of the work or material, or for the price as expressly contracted for by the claimant? According to the holdings on these questions is the rule established, and successive decisions in the same state often create shades of distinction which render unsettled what had before been deemed definitely determined.

[4] **Kerr's Cyc. Code Civ. Proc., §§ 1183-1203a.**

[4a] **Lien on land or structure?** In this connection the case of Humboldt L. & M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75, is of interest. In that case the court held that under the California mechanic's-lien law, no mechanic's lien can attach to the land for labor or material furnished in the erection of a building which was destroyed by fire before its completion. See Hogan v. Globe Mut. B. & L. Assoc., 140 Cal. 610, 74 Pac. Rep. 153.

There is some conflict in the decisions on this point. The cases are all collected in a note in 2 Am. & Eng. Ann. Cas. 812.

Inadvertent statements in arguendo and in dictum frequently cast doubt upon well-considered doctrine, and thus render investigations in this field exceedingly perplexing.

§ 4. **Historical.** Liens by contractors, subcontractors, material-men, mechanics, or laborers for work done or material furnished upon a building or other structure were unknown to the common law or in equity jurisprudence,[5] both in England and in this country; but they were clearly defined and regulated in the civil law.[6] Where they exist in this country, they are the creations of local legislation.[7]

[5] Ellison v. Jackson W. Co., 12 Cal. 542, 554; McNeil v. Borland, 23 Cal. 144, 148; Spinney v. Griffith, 98 Cal. 149, 151, 32 Pac. Rep. 974.

Alaska. Jorgensen v. Sheldon, 3 Alas. 607.

Colorado. Greeley Co. v. Harris, 12 Colo. 226, 20 Pac. Rep. 764; Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 791; Barnard v. McKenzie, 4 Colo. 251; Pitschke v. Pope, 20 Colo. App. 328, 78 Pac. Rep. 1077.

Hawaii. Hackfeld v. Hilo R. Co., 14 Hawn. 448, 451.

Montana. Mochon v. Sullivan, 1 Mont. 472.

New Mexico. Ford v. Springer L. Assoc., 8 N. M. 37, 48, 41 Pac. Rep. 541.

[6] South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, 18 L. ed. 894; Macondray v. Simmons, 1 Cal. 393, 395.

New Mexico. Ford v. Springer L. Assoc., 8 N. M. 37, 48, 41 Pac. Rep. 541; Minor v. Marshall, 6 N. M. 195, 27 Pac. Rep. 481.

[7] **California.** See Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748; McCrea v. Craig, 23 Cal. 522; Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336; Morris v. Wilson, 97 Cal. 644, 32 Pac. Rep. 801; Spinney v. Griffith, 98 Cal. 149, 32 Pac. Rep. 974; McLaughlin v. Perkins, 102 Cal. 502, 36 Pac. Rep. 839.

Colorado. See Barnard v. McKenzie, 4 Colo. 251; Greeley S. L. & P. R. Co. v. Harris, 12 Colo. 226, 20 Pac. Rep. 764; Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. Rep. 806; Hanna v. Colorado Sav. Bank, 3 Colo. App. 28, 31 Pac. Rep. 1020; Estey v. Hallack & H. L. Co., 4 Colo. App. 165, 34 Pac. Rep. 1113; Florman v. School Dist., 6 Colo. App. 319, 40 Pac. Rep. 469; Johnston v. Bennett, 6 Colo. App. 362, 40 Pac. Rep. 847; Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. Rep. 844; Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64; Cornell v. Conine-Eaton L. Co., 9 Colo. App. 225, 47 Pac. Rep. 912; Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

New Mexico. See Finane v. Las Vegas Hotel & Imp. Co., 3 N. M. 256, 5 Pac. Rep. 725; Houghton v. Las Vegas Hotel & Imp. Co., 3 N. M. 419, 5 Pac. Rep. 729; Boyle v. Mountaineer M. Co., 9 N. M. 237, 50 Pac. Rep. 347, 352.

The first mechanic's-lien act was passed in 1791 by the general assembly of Maryland, at the solicitation of a commission of which Thomas Jefferson and James Madison were members, and was induced by a desire to encourage the rapid building up of the city of Washington as a permanent seat of government: Boyle v. Mountaineer M. Co., 9 N. M. 237, 50 Pac. Rep. 347, 352.

Oregon. See Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305.

They are governed in everything by the statutes under which they arise, and these statutes differ widely in different states,[8] although mining interests have in some measure tended to produce a degree of uniformity among those of the Pacific Coast states.

§ 5. **Evolution of California mechanic's-lien law.** The present mechanic's-lien law of California is an evolution from prior statutes of the state upon the same subject, resulting from a desire of the legislature to adjust the respective rights of lien claimants and those of the owners of the property improved by their labor and material.[9] This statute is provided for by the state constitution, and is embodied in the California codes.[10] There has been no gen-

[8] South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, 18 L. ed. 894, on appeal from 1 McAl. 513, 10 Fed. Cas., p. 817.

The fundamental idea of the mechanic's-lien law was probably more immediately borrowed from the maritime liens given to material-men and seamen in admiralty for materials furnished and labor performed on vessels, and such liens, unlike common-law liens, were not dependent upon possession. The maritime lien was, of course, borrowed from the civil law. The idea of a mechanic's lien, however, certainly did not follow all those systems founded upon the civil law, at least so far as real property is concerned. Thus under the law of Mexico, the person who furnished materials for the erection of a building had no lien upon the building to secure payment for the same (Macondray v. Simmons, 1 Cal. 393, 395; Stowell v. Simmons, 1 Cal. 452), although such a lien was awarded to the person who lent money for the purpose of building, repairing, and supplying a ship, house, or other building, or for labor thereon: Macondray v. Simmons, 1 Cal. 393, 395.

[9] Corbett v. Chambers, 109 Cal. 178, 181, 41 Pac. Rep. 873.

[10] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws,** p. civ; **Kerr's Cyc. Code Civ. Proc.,** §§ 1182-1203a, and **Kerr's Cyc. Civ. Code,** § 3059.

It is not quite apparent why the legislature has placed in a portion of the statute expressly reserved for procedure provisions establishing primary rights, except, perhaps, from a desire to keep the provisions together.

Statutes of other states and territories. The following tabulation shows the statutes of the Pacific states and territories, other than California, which embrace the subject of mechanics' liens, without reference to amendments or special statutes relating to particular liens:

Alaska. Carter's Civ. Code 1900, pt. v, §§ 262-275 (act of Cong., June 6, 1900, ch. lxxvi), 31 Stats. at L., p. 321; 3 Gould and Tucker's Notes Rev. Stats. U. S., pp. 224, 337; 10 Fed. Stats. Ann., p. 282.

Arizona. Rev. Stats. 1901, tit. xl, §§ 2888-2934.

Colorado. 3 Mills's Ann. Stats., 2d ed., §§ 2867-2891.

eral revision of the California mechanic's-lien law since the adoption of the codes, but changes have been made through amendments and modifications of and additions to the various sections thereof.[11]

§ 6. **Spirit of the law.** The mechanic's-lien law is intended to give to persons of ordinary intelligence the means by which they may secure themselves for their work and materials, not to provide a snare to involve them in the intricacies of the law; for they are not presumed to be

Modeled after California statute. The statute of Colorado (Stats. 1903, ch. cxvii, p. 315, was evidently modeled upon that of California: See Chicago Lumber Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789.

The act of 1883 remained in force for six years; it was amended in 1889, again in 1891, and still again in 1893: Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809.

The act of 1893 was repealed and a new act passed in 1899. The latter act contained many of the provisions of the act of 1893, as well as some additional ones: Burleigh Bldg. Co. v. Merchant Brick and Bldg. Co., 13 Colo. App. 455, 460, 59 Pac. Rep. 83, 84.

Hawaii. Rev. Stats. 1905, tit. xviii, ch. cxl, §§ 2173-2178.

Idaho. Sess. Laws 1899, p. 147, and act approved March 14, 1899.

By the act of 1893, the entire theory of the Idaho mechanic's-lien law was changed. See, for history, dissenting opinion of Ailshie, J., in Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 516.

Montana. Code Civ. Proc., §§ 2130-2141, 3942.

Nevada. Cutting's Comp. L. 1900, §§ 3881-3900.

New Mexico. Comp. Laws 1897, tit. xxiv, §§ 2216-2232.

Oklahoma. 2 Rev. Stats. 1903 (4817-4831), §§ 619-633.

Oregon. 2 Bellinger and Cotton's Ann. Codes and Stats., §§ 5481-5484, 5653-5659, 5663-5672.

Utah. Rev. Stats. 1898, ch. i, tit. xxxix, §§ 1372-1400. See Eccles Lumber Co. v. Martin (Utah), 87 Pac. Rep. 713, 715.

Washington. Pierce's Code, §§ 6102-6121, 6133-6137.

Wyoming. Rev. Stats. 1899, §§ 2868-2910. This statute was taken substantially from the statute of Missouri: Big Horn L. Co. v. Davis, 14 Wyo. 455, 84 Pac. Rep. 905, 85 Id. 1048, citing Wyman v. Quale, 9 Wyo. 326, 63 Pac. Rep. 988.

[11] Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 117, 65 Pac. Rep. 329.

The owner of the land, in most instances, is the person this law deals with; but in some cases it provides that the owner, and any other person having an interest in the land, shall be bound when the improvement is made with his knowledge, unless he shall within a certain time give the notice required by statute (**Kerr's Cyc. Code Civ. Proc.,** § 1192): Santa Cruz Rock Pav. Co. v. Lyons, supra.

Reputed owner cannot bind property for street improvements, etc.: Santa Cruz Rock Pav. Co. v. Lyons, 117 Cal. 212, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174.

versed in such niceties as those of pleading,[12] nor to be adepts in accuracy of expression.[13] "The legislature has industriously endeavored by extreme means not only to protect and favor mechanics and laborers who actually work on buildings (which seems to have been the original notion of a 'mechanic's lien'), but also certain merchants, who are brought in under the category of 'material-men.'" [14]

§ 7. Theory of the mechanic's-lien law. The general principle upon which all mechanic's-lien laws are based is, that they are remedial in their nature,[15] intended to aid contractors, material-men, mechanics, and laborers to secure the just or contract price for materials furnished, money expended, labor furnished or done upon property, on the theory that the material used in or labor expended upon the specific property has enhanced its value,[16] and that it is equitable

[12] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873; Union Lumber Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1078.

Utah. The law is not for poor persons only, but also for those who can bring themselves within its terms: Venard v. Green, 4 Utah 67, 6 Pac. Rep. 415, 7 Id. 408.

[13] Union Lumber Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1078, aff. in sup. ct., 89 Pac. Rep. 1081.

[14] Booth v. Pendola, 88 Cal. 36, 42, 23 Pac. Rep. 200, 25 Pac. Rep. 1101. See §§ 42-44, post.

Colorado. As to such statutes being special or class legislation, see Rice v. Carmichael, 4 Colo. App. 84, 86, 34 Pac. Rep. 1010; Anderson v. Bingham, 1 Colo. App. 222, 28 Pac. Rep. 145.

See §§ 6 et seq., post.

Oregon. It is a "privilege": Horn v. United States Min. Co., 47 Oreg. 124, 81 Pac. Rep. 1009; Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 96, 75 Am. St. Rep. 574; Brown v. Harper, 4 Oreg. 89, Gray v. Jones, 47 Oreg. 40, 81 Pac. Rep. 813.

"Extraordinary right": Tatum v. Cherry, 12 Oreg. 135, 6 Pac. Rep. 715 (1874).

Utah. "Privilege": Dwyer v. Salt Lake City Mfg Co., 14 Utah 339, 47 Pac. Rep. 311.

[15] Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1078.

See §§ 9, 25, post.

[16] Hamilton v. Delhi M. Co., 118 Cal. 148, 154, 50 Pac. Rep. 378; Birch v. Magic Transit Co., 139 Cal. 496, 498, 73 Pac. Rep. 238; and see Tuttle v. Montford, 7 Cal. 358, 360; McCrea v. Craig, 23 Cal. 523, 525; Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75; Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262. But see Dore v. Sellers, 27 Cal. 588, 594 (1862).

Labor on a mining claim, on the other hand, "cannot generally be said to have contributed to the creation of the property or added to

that the material-man should follow his material into the building of which it has become a component part, or that

its value; on the contrary, it may diminish its value, perhaps render it valueless": Williams v. Mountaineer G. M. Co., 102 Cal. 134, 139, 34 Pac. Rep. 702, 26 Id. 388.

Work in "developing" or showing up the riches of a mine is certainly considered among mining men to be of great value to such property. Indeed, until a piece of mining-ground is thus "proved," it does not, in the view of those engaged in the business, rise to the dignity of a "mine." In view of the general extension of this class of legislation to objects other than those originally contemplated by the statutes, namely, "structures," the adjudicated doctrine set forth in the text must be considered inadequate to express the real principle underlying this growth of legislation. The tentative suggestion is made that the principle is, that property, or an interest therein, owned by one who receives such a benefit through or by means of the same, should be held as security for the value conferred.

Colorado. Barnard v. McKenzie, 4 Colo. 251, 252; Lindemann v. Belden Cons. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403. "The construction of a building involves the co-operation of a variety of agencies. It is not built by the original contractor himself. It is true that he undertakes its construction, but to enable him to execute his contract he must rely to a greater or less extent upon others. The accomplishment of the work requires the purchase of material and the employment of mechanical and other labor, of all of which the owner receives the benefit. The purpose, generally, of laws providing for mechanics' liens is to afford some measure of security to those whose property and services have entered into the improvement, and such laws have, as a rule, been upheld by the courts": Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 788.

Hawaii. "The statute is artificial — arbitrary. It gives the material-man exceptional privileges, but it gives these only on condition that he shall comply with the terms of the statute": Allen v. Redward, 10 Hawn. 151, 157.

Montana. A. M. Holter Hardware Co. v. Ontario M. Co., 24 Mont. 198, 61 Pac. Rep. 8, 81 Am. St. Rep. 421. See Duignan v. Montana Club, 16 Mont. 189, 40 Pac. Rep. 294; Mochon v. Sullivan, 1 Mont. 472; Davis v. Alvord, 94 U. S. 545, 547, bk. 24 L. ed. 283.

New Mexico. Hobbs v. Spiegelberg, 3 N. M. 529, 5 Pac. Rep. 529. "To protect laborers": Mountain Electric Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284. "We suggest that the policy in favor of mechanics in the United States was conceived to stimulate the construction of towns and cities, and that the system has been extended, commensurately with the growth of the country, to promote its prosperity in the development of its mineral resources. It seems logical and fair to believe that similar inducements would have been extended, as far as practicable, to agricultural and other employees, had it been either essential or contributive to the interests of the public and the progress of the country": Boyle v. Mountain Key M. Co., 9 N. M. 237, 50 Pac. Rep. 347.

Oklahoma. "Remedial": See El Reno Electric Co. v. Jennison, 5 Okla. 763, 50 Pac. Rep. 144.

Oregon. Gordon v. Deal, 23 Oreg. 153, 31 Pac. Rep. 287; Pilz v. Killingsworth, 20 Oreg. 432; Kezartee v. Marks, 15 Oreg. 529, 534, 162 Pac. Rep. 407; Patterson v. Gallagher, 25 Oreg. 227, 35 Pac. Rep.

the laborer should pursue the result of his toil,[17] in order to secure his just compensation;[18] and because the building is the result of such labor done and material furnished, that it is not just that the owner should succeed to that labor and material without compensating the persons furnishing such labor or material.[19]

§ 8. **A favored lien.** For the reasons given in the foregoing section, a mechanic's lien is a favored lien;[20] and for the same reasons the substitute for the remedy by lien, in the nature of a garnishment by notice, given to the owner under the Code of Civil Procedure,[21] is a remedy which should be regarded with favor by the court.[22] Some courts, while intimating, at times, their disposition to criticize the

454, 42 Am. St. Rep. 794. See Ainslie v. Kohn, 16 Oreg. 363, 370, 19 Pac. Rep. 97.

Utah. Salt Lake Litho. Co. v. Ibex Mine & S. Co., 15 Utah 445, 49 Pac. Rep. 832; Eccles L. Co. v. Martin, 87 Pac. Rep. 713, 716. See Garland v. Irrigation Co., 9 Utah 350, 362, 34 Pac. Rep. 368.

Washington. "To secure the pay of the laborer": Eisenbeis v. Wakeman, 3 Wash. 534, 538, 28 Pac. Rep. 923.

[17] Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 687, 688, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75.

[18] Brill v. De Turk, 130 Cal. 241, 242, 62 Pac. Rep. 462.

Alaska. To do substantial justice to all parties: Russell v. Hayner, 130 Fed Rep. 90, 64 C. C. A. 424, 2 Alas. 702, 703 (Dig.).

Colorado. Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403; Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786.

Hawaii. Allen v. Redward, 10 Hawn. 151, 159.

Montana. A. M. Holter Hardware Co. v. Ontario Min. Co., 24 Mont. 198, 61 Pac. Rep. 8, 81 Am. St. Rep. 421.

New Mexico. Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 Pac. Rep. 743; Boyle v. Mountain Key M. Co., 9 N. M. 237, 50 Pac. Rep. 347, 352.

[19] Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75; Avery v. Clarke, 87 Cal. 628, 25 Pac. Rep. 919, 22 Am. St. Rep. 272. See Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 22 Pac. Rep. 860. But see Dore v. Sellers, 27 Cal. 588, 594 (1862).

[20] McCrea v. Craig, 23 Cal. 523.

See note 4 Am. & Eng. Ann. Cas. 620.

Montana. It is remedial: Richards v. Lewisohn, 19 Mont. 128, 47 Rep. Pac. 645; Mochon v. Sullivan, 1 Mont. 470, 472; and rests upon the broad foundation of natural equity and commercial necessity: Mochon v. Sullivan, 1 Mont. 472.

[21] **Kerr's Cyc. Code Civ. Proc.**, § 1184.

[22] Bates v. County of Santa Barbara, 90 Cal. 543, 547, 27 Pac. Rep. 438; Board of Education v. Blake (Cal.), 38 Pac. Rep. 536.

See "Liability as Fixed by Notice," §§ 547 et seq., post.

policy of the legislature in confining such liens to those enumerated in the statute, have, nevertheless, endeavored to follow out the spirit of the law as thus indicated.[23] It is to be noted that the tendency of legislation in recent years has been to extend, rather than to restrict, the classes of liens similar to those under consideration.

§ 9. General nature of the lien.[24] Plan of discussion. In the sections immediately following will be considered briefly: I. The general classification of liens of this character; II. The kinship between the statutes of the various jurisdictions herein treated; and III. The general peculiarities of such liens. The development of each of these heads will be left for subsequent sections.

§ 10. I. General classification of liens of this character. An important matter in construing the mechanic's-lien statute of a state, as well as in determining the weight to be given to a decision of a sister state, is that of ascertaining the general nature of the lien provided by statute. These liens differ materially, and a number of classifications appeal to the investigator; for they may be classified, as follows:

1. **As to the contractual relation** existing between the owner and the original contractor; whether (a) upon the object or thing, without reference to such contractual relation, which is known as the "direct lien," or Pennsylvania system; or (b) subordinate to such contractual relation, which is known as the "indirect lien," or New York system.[25]

2. **As to the object or thing** to which the lien attaches: (a) on the land; (b) on the building or structure; or (c) on the fund.

Each of these classifications may be further subdivided

[23] **Colorado.** See Burleigh Bldg. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 460, 59 Pac. Rep. 83, 84.

New Mexico. See Boyle v. Mountain Key M. Co., 9 N. M. 237, 50 Pac. Rep. 347, 352.

[24] See "Nature of Action to Foreclose Lien," § 640, post. As to general nature and scope of right, see note 13 L. R. A. 701.

[25] New York lien: See note 13 L. R. A. 701.

by the consideration of the question whether the lien is limited in amount (1) to the "agreed price," or (2) to the "value" of the work or materials.

§ 11. **Another classification.** Another classification has been suggested, as follows: 1. In a few states, subclaimants are not given a lien upon the property, but only on the debt payable by the owner to the contractor. 2. In many states a direct lien is given on the property, but with the express limitation to the amount of the original contract price. Under these two classes of statutes, the right of a subclaimant has generally been held to be controlled by the state of the account between the owner and the contractor, the subclaimants being merely subrogated to the rights of the contractor. 3. In other states, a direct lien is given upon the property, either with qualifying or limiting expressions as to amount, as in many states, or with expressions clearly showing that there is no limit, as in a few states.[26] In such states, the courts have generally held that the material-man may have a lien for the reasonable value of the materials furnished by him, even though in excess of the amount payable to the original contractor under the original contract.[27]

§ 12. **The classification adopted herein.** For the purposes of the discussion, however, the first of the above classifications will be used in this work, as being more logical and exhaustive, as well as being more in consonance with the general plan adopted.

[26] See "Lien as Limited by Contract," §§ 459 et seq., post.

[27] **Hawaii.** The Hawaiian statute is of the nature last stated in the text, as it gives a direct lien upon the property to a subcontractor, without limit with reference to the contract price. Section 1 of the statute gives a lien "to any person furnishing material," and makes no distinction between the contractor and subcontractors. The lien is "for the price agreed to be paid." This may mean the price agreed either between the owner and contractor, or between the contractor and material-man. It would naturally mean the price agreed to, on one side at least, by "the person furnishing materials," and that would be the subcontractor, if the materials were furnished by him: Allen v. Redward, 10 Hawn. 151, 154.

§ 13. Same. Contractual relation between owner and original contractor. The present California statute is peculiarly complicated, and much confusion and misunderstanding concerning its nature has arisen, not only in the decisions of the courts of other states, but also in those of California. This results, in part, from the fact that the statute combines within itself a number of the systems above outlined; and while some courts, on the one hand, declare that it creates a "direct lien," or belongs to the Pennsylvania system,[28] others declare with equal force that it creates an "indirect lien," under the so-called New York system.[29] It is thought that there is truth in both contentions, so far as this particular classification goes. As tending in a measure to clear up this involved subject, the following tentative suggestion is made: The California statute, in a general way, so far as relates to this matter, has three aspects: It creates — 1. A direct lien; 2. An indirect lien, upon the property; and 3. A lien upon the fund.[30]

§ 14. Same. Valid and void contract. Effect. Where the original contract is valid, all liens on the property are marshaled under the original contract, which feeds them. That is the central idea of the New York system, or indirect lien. Where the original contract is void under certain circumstances, the liens upon the property are direct and independent of any contract which would otherwise limit them. This is the underlying principle of the Pennyslvania system. Bearing these basic distinctions in mind, we may the better be enabled to consider the various problems as they arise.[31]

[28] See Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 689, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75; Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

[29] New York system: Dissenting opinion of Ailshie, J., in Pacific States Sav. B. & L. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 517.

[30] This last lien, the one upon the fund, has given the courts considerable difficulty, and its relation to the lien upon the property has not been presented by the courts in such manner as to avoid criticism: See "Liability of Owner as Fixed by Notice," §§ 547 et seq., post.

[31] **Colorado.** Intimated, but not decided, that the lien law of 1893, p. 315, gave a direct lien — discussion of direct and indirect lien: See Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

§ 15. Same. The object or thing to which the lien attaches. The lien on the land itself and on the structure will be considered together for convenience. It has been held, under the California statute, that the completed building is the principal thing upon which the right to a lien is given, and the land upon which it is situated is an incident to its completion.[32] If, for instance, the building in course of erection should be destroyed by fire without the fault of the owner, it has been held that the lien has nothing upon which it can attach; the principle of the decision being that no benefit has been conferred upon the owner, and that the court cannot determine what amount of land is necessary

There must be a contract under which the work is done: Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340. See paragraph on **New Mexico,** this note.

Hawaii. It is not the contract for erecting or repairing a building which creates the lien, but it is the use of the materials furnished, or the work or labor performed by the contractor, whereby the building becomes part of the freehold, that gives subclaimant his lien under the statute: Hackfeld v. Hilo R. Co., 14 Hawn. 448, 451.

Idaho. In the dissenting opinion of Ailshie, J., in Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 517, it is said that the act of 1893 changed from the indirect system to the direct system, giving an absolute lien on the property.

New Mexico. As to the general nature of the mechanic's-lien law of Colorado (2 Mills's Ann. Stats., §§ 2867-2899), see Genest v. Las Vegas Masonic B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743, 746.

Oregon. The lien on railroads given by Laws 1889, p. 75, held to confer an indirect lien: Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Pep. 656.

Utah. A contract, express or implied, for the improvement must have been made with the owner thereof, or his authorized agent, before a claim of lien for an improvement can be maintained: Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713, 715.

Washington. The lien exists independently of any special contract. Where a contract is entered into by the parties, it is not the contract which creates the lien under the statute, but it is the use of the materials furnished upon the premises. The statute does not give a claimant a right to his debt, but furnishes a remedy for its collection: Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

[32] Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75; Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262; Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.

See **Kerr's Cyc. Code Civ. Proc.,** § 1185.

Utah. In this state, however, a mechanic's lien can only be acquired on the land, and the buildings or improvements are to be taken as appurtenant merely, under Rev. Stats. 1898, tit. xxxix: Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713, 715, 716.

for the convenient use and occupation mentioned in the mechanic's-lien statute.[33]

§ 16. **Same. Lien on structure separate from land.** The primary lien of contractors, material-men, mechanics, and laborers being upon the competed building or improvement, and on as much of the land "as may be required for the convenient use and occupation thereof,"[34] merely as an incident of the completion and use of the building,[35] where a building is erected upon land at the instance of one who falsely represents himself as the owner thereof, the lien for work and labor done and material furnished in the erection of such building may be enforced against building separate and apart from the land on which it rests, notwithstanding the fact that the building, when completed, becomes a part of the land; and the court, on foreclosure of the mechanic's lien, may decree that the building be severed from the land and sold in satisfaction of the lien, in the absence of any showing by the real owner that his land will be injured thereby.[36]

This subject will be further considered under the head of "Object upon Which Labor must be Performed."[37]

To avail himself of the benefit of the construction of the building, "he should be required, in common honesty, to pay the liens thereon occasioned by its construction, created in good faith, without knowledge that the erection of the building was unauthorized" by him.[38]

[33] **Kerr's Cyc. Code Civ. Proc.**, § 1185. See Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75. In this case it did not clearly appear whether the lien was claimed by the original contractor or subclaimants; probably by the latter.

See further authorities on question discussed in text, in note 2 Am. & Eng. Ann. Cas. 811.

[34] See **Kerr's Cyc. Code Civ. Proc.**, § 1185.

[35] Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75.

New Mexico. See Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

Utah. See Sanford v. Kunkel (Utah), 85 Pac. Rep. 363, 1012.

[36] Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.

[37] §§ 166 et seq., post.

[38] Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.

§ 17. **Same. Lien on the fund.** The right to enforce a mechanic's lien on the fund, in the absence of a lien on the property, has been the subject of recent discussion by the courts of California, and in a late decision of the appellate court there has been shown a lack of appreciation of the true significance of this lien and its relation to the lien upon the property. This subject will be hereafter fully considered under the head of "Liability of Owner as Fixed by Notice." [39]

§ 18. **II. The kinship between statutes of the various states.** In this treatise no attempt will be made to compare the various statutes as a whole. The author will confine his efforts merely to setting forth what has been said by the courts as to their relationship. Similar sections of the different acts will be found in the "Table of Correlated Sections," in this volume. The supreme court of California has said that the provisions of the code [40] regulating this subject agree more nearly with the Pennsylvania and Wisconsin statutes than with the statutes of any other states.[41]

§ 19. **III. The general peculiarities of mechanics' liens.** The mechanic's lien is purely a creature of statute,[42] and

[39] §§ 547 et seq., post. See also "Contract," §§ 193-228, post, and "Extent of Lien as Limited by Contract," §§ 459 et seq., post.

[40] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1203a.

[41] Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 689, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75.

As to the kinship between the California, Washington, Nevada, and Idaho statutes, see Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513.

As to the relation between the early California decisions and the Texas, Nevada, Washington, and New Mexico systems, see Allen v. Redward, 10 Hawn. 151, 157.

New Mexico. 2 Mills's Ann. Stats. Colo., §§ 2867-2899, declared very dissimilar to those of New Mexico: See Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 Pac. Rep. 743, 746.

[42] San Francisco Pav. Co. v. Fairfield, 134 Cal. 222, 224, 66 Pac. Rep. 255; Reese v. Bald Mountain Consol. G. M. Co., 133 Cal. 285, 290, 65 Pac. Rep. 578; Dunlop v. Kennedy (Cal. Sup.), 34 Pac. Rep. 92, 95; Valley L. Co. v. Wright, 2 Cal. App. 288, 291, 84 Pac. Rep. 58; Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681; Whitney v. Higgins, 10 Cal. 547, 551, 70 Am. Dec. 748; Ellison v. Jackson W. Co., 12 Cal. 542, 554; McNeil v. Borland, 23 Cal. 144, 148; Spinney v. Griffith, 98 Cal. 149, 151, 32 Pac. Rep. 974; Morris v. Wilson, 97 Cal. 644, 646, 32 Pac. Rep. 801; McLaughlin v. Perkins, 102 Cal. 502, 506, 36 Pac. Rep. 839;

the statute creating it must be looked to, both for the right to such lien and the mode by which it is secured [43] or

Corbett v. Chambers, 109 Cal. 178, 180, 41 Pac. Rep. 873; Davis v. MacDonough, 109 Cal. 547, 550, 42 Pac. Rep. 450.

See § 1, ante.

As to lien, not a mechanic's lien, of mining partner for work on mine, see Frowenfeld v. Hastings, 134 Cal. 128, 66 Pac. Rep. 178.

Alaska. Russell v. Hayner, 130 Fed Rep. 90, 64 C. C. A. 424, 2 Alas. 702, 703 (Dig.); Jorgensen v. Sheldon, 2 Alas. 607.

Colorado. Antlers Park Regent M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226; Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340; Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846; Michael v. Reeves, 14 Colo. App. 460, 60 Pac. Rep. 577; Lindemann v. Belden Cons. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403; Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 423; Barnard v. McKenzie, 4 Colo. 251; Greeley S. L. & P. R. Co. v. Harris, 12 Colo. 226, 20 Pac. Rep. 764; Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 745; Cornell v. Conine-Eaton L. Co., 9 Colo. App. 225, 47 Pac. Rep. 912; Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. Rep. 844; Hanna v. Colorado Sav. Bank, 4 Colo. App. 28, 31 Pac. Rep. 1020; Pitschke v. Pope, 20 Colo. App. 328, 78 Pac. Rep. 1077; Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 788.

Cannot be extended or restrained by the acts of the parties: Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403, citing Florman v. School Dist. No. 11, El Paso Co., 6 Colo. 319, 40 Pac. Rep. 469; Johnston v. Bennett, 6 Colo. App. 362, 40 Pac. Rep. 847.

Idaho. Bradbury v. Idaho & O. Land Imp. Co., 2 Idaho 239, 10 Pac. Rep. 620.

Montana. Richards v. Lewisohn, 19 Mont. 128, 47 Pac. Rep. 645; Alvord v. Hendrie, 2 Mont. 115; Mochon v. Sullivan, 1 Mont. 470, 472.

Nevada. Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. Rep. 50.

New Mexico. Ford v. Springer Land Assoc., 8 N. M. 57, 41 Pac. Rep. 541; Finane v. Hotel Co., 3 N. M. 256, 5 Pac. Rep. 725; Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

Oregon. Willamette S. M. L. & Mfg. Co. v. Shea, 24 Oreg. 40, 52, 32 Pac. Rep. 759; Nicolai v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288; Gordon v. Deal, 23 Oreg. 153, 31 Pac. Rep. 287; Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305; Allen v. Rowe, 19 Oreg. 188. 23 Pac. Rep. 901.

Utah. Morrison, Merrill & Co. v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784; Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713.

Washington. Marks v. Pence, 31 Wash. 426, 71 Pac. Rep. 1096; Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397; McHugh v. Slack, 11 Wash. 370, 372, 39 Pac. Rep. 674; United States Sav. L. & B. Co. v. Jones, 9 Wash. 434, 441, 37 Pac. Rep. 666; Johnston v. Harrington, 5 Wash. 73, 80, 31 Pac. Rep. 316. See dissenting opinion, Tacoma L. & Mfg. Co. v. Wolff, 7 Wash. 478, 35 Pac. Rep. 115, 755.

[43] Spinney v. Griffith, 98 Cal. 149, 151, 32 Pac. Rep. 974; Giant Powder Co. v. San Diego F. Co., 97 Cal. 263, 32 Pac. Rep. 172; Winrod v. Wolters, 141 Cal. 399, 402, 74 Pac. Rep. 1037.

A void lien cannot be converted into a valid one by consent: San Francisco P. Co. v. Fairfield, 134 Cal. 220, 224, 66 Pac. Rep. 255.

Washington. See United States Sav. L. & B. Co. v. Jones, 9 Wash. 434, 441, 37 Pac. Rep. 674; Johnston v. Harrington, 5 Wash. 73, 80, 31 Pac. Rep. 316.

enforced.[44] A person, to avail himself of the statute, must comply with its terms;[45] for, generally, the right to the lien does not, of itself, create the lien,[46] and before the claim of lien is filed the lien is inchoate;[47] but the same rule which makes it essential that all statutory requirements be complied with in order to perfect the lien renders it unnecessary to take any other step than is so required.[48]

§ 20. Relation of lien to the debt. The lien does not destroy any contractual relation or indebtedness that might otherwise arise, and the debt which would exist if there were no mechanic's lien may be enforced, like any other debt, by an action in the proper court.[49] The lien is a mere

[44] Reese v. Bald Mountain Consol. G. Min. Co., 133 Cal. 285, 65 Pac. Rep. 578; Davis v. MacDonough, 109 Cal. 547, 550, 42 Pac. Rep. 450.

[45] San Francisco Pav. Co. v. Fairfield, 134 Cal. 222, 224, 66 Pac. Rep. 255; Morris v. Wilson, 97 Cal. 644, 646, 32 Pac. Rep. 801; Corbett v. Chambers, 109 Cal. 178, 180, 41 Pac. Rep. 873; Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 631, 43 Pac. Rep. 14 (under Stats. 1891, p. 195 — on property of corporations); Kuschel v. Hunter (Cal., Sept. 14, 1897), 50 Pac. Rep. 397.

See "Construction of Statute," §§ 24-27, post.

Alaska. Russell v. Hayner, 130 Fed. Rep. 90.

Colorado. Greeley S. L. & P. R. Co. v. Harris, 12 Colo. 226, 20 Pac. Rep. 764; Michael v. Reeves, 14 Colo. App. 460, 60 Pac. Rep. 577.

Utah. Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713.

[46] San Francisco Pav. Co. v. Fairfield, 134 Cal. 222, 224, 66 Pac. Rep. 255.

See "Claim of Lien," § 362, post.

[47] Provident Mut. B. & L. Assoc. v. Shaffer, 2 Cal. App. 216, 83 Pac. Rep. 274; Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681, 683.

See "Claim," § 362, post.

Colorado. Sprague Inv. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 182.

Hawaii. Lucas v. Redward, 9 Hawn. 23, 25.

Montana. See McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428.

Oregon. But, under the law relating to the liens on railroads (Laws 1889, p. 75), the lien is created by serving the notice prescribed by the statute: Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Rep. 656.

Utah. Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605.

[48] Corbett v. Chambers, 109 Cal. 178, 180, 41 Pac. Rep. 873.

[49] **Kerr's Cyc. Code Civ. Proc.,** § 1197, and note; Brock v. Bruce, 5 Cal. 279, 280; McNeil v. Borland, 23 Cal. 144, 149; Hunt v. Darling, 26 R. I. 480, 3 Am. & Eng. Ann. Cas. 1098, 59 Atl. Rep. 398.

See authorities collected in note 3 Am. & Eng. Ann. Cas. 1100.

See also "Obligation of Owner," §§ 523 et seq., post; and "Cumulative Remedies," §§ 638 et seq., post.

Debt and lien separated. It was held in McNeil v. Borland, 23 Cal. 144, 149, under the act of 1861 giving liens to mechanics and others,

incident to the debt or claim,[50] follows it, and may be enforced in the same action;[51] and no lien can exist without an indebtedness due to the claimant from some person.[52]

§ 21. Mechanic's lien and mortgage compared. It has been said that a mechanic's lien is in the nature of a mortgage and is a charge upon the land;[53] but a mechanic's lien does not closely resemble, in these respects, a mortgage, as

that the debt and the lien were expressly separated, owing to the peculiar character of the procedure provided by the act, which was not an "action," but a "special case," in substantial identity with proceedings in insolvency, so far as the presentation of claims is concerned.

[50] Ritter v. Stevenson, 7 Cal. 388, 389; Duncan v. Hawn, 104 Cal. 10, 12, 37 Pac. Rep. 626.

See **Kerr's Cyc. Civ. Code,** § 2909, and note.

Montana. Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

Nevada. Hampton v. Truckee C. Co., 19 Fed. Rep. 1, 4 (1875).

Utah. Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[51] Brock v. Bruce, 5 Cal. 279, 280; McNeil v. Borland, 23 Cal. 144, 149.

See "Cumulative Remedies," §§ 638 et seq., post.

Colorado. Bradbury v. Butler, 1 Colo. App. 430, 29 Pac. Rep. 463.

Nevada. See Skyrme v. Occidental M. & M. Co., 8 Nev. 219, 231.

Utah. See Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[52] See Shuffleton v. Hill, 62 Cal. 483, 484, 6 West Coast Rep. 436; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860.

Hawaii. But see Hackfeld v. Hilo R. Co., 14 Hawn. 448, 451.

Montana. Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991; Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054, 1055, 1056.

Washington. See Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

Intention to enforce a lien need not be present at the time of furnishing the materials: Knudson-Jacob Co. v. Brandt (Wash.), 87 Pac. Rep. 43.

[53] Ritter v. Stevenson, 7 Cal. 388, 389; Brock v. Bruce, 5 Cal. 279, 280; Curnow v. Happy Valley etc. Co., 68 Cal. 262, 264, 9 Pac. Rep. 149. See Duncan v. Hawn, 104 Cal. 10, 15, 37 Pac. Rep. 626; McNeil v. Borland, 23 Cal. 144, 149. The cases of Ritter v. Stevenson and Duncan v. Hawn, supra, had reference more particularly to its assignment and the statute of frauds, rather than to its definition or characteristic features.

Colorado. It is "equitable in purpose": Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456; Bradbury v. Butler, 1 Colo. App. 430, 29 Pac. Rep. 463.

Montana. Possession not necessary: Mochon v. Sullivan, 1 Mont. 472.

Nevada. Rosina v. Trowbridge, 20 Nev. 105, 112, 17 Pac. Rep. 751. See Skyrme v. Occidental M. & M. Co., 8 Nev. 231.

defined by the Civil Code,[54] except, perhaps, in the case of an original contractor, whose contract, with the implied consent of the owner, has attached to it, as security, the lien which the statute affords; and even if the owner were to give a laborer or material-man a mortgage upon his property to secure him for labor done or materials furnished for such property, it could not be considered a mechanic's lien within the meaning of the Code of Civil Procedure;[55] nor would an agreement by the owner of a building to pay a present, existing indebtedness be a sufficient basis upon which to charge a mechanic's lien upon a building; nor would the assumption of a debt, nor an agreement to pay a debt, by an owner, in any case, carry or create a right to a mechanic's lien proprio vigore.[56]

§ 22. **Nature of action to foreclose lien.** The action to foreclose the lien is of an equitable nature,[57] and is also in the nature of a proceeding in rem.[58] The proceeding to reach funds in the hands of the owner, under the provisions of the code,[59] is also of an equitable nature.[60]

New Mexico. See Genest v. Las Vegas Masonic B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

Utah. See Salt Lake Litho. Co. v. Ibex M. & S. Co., 15 Utah 445, 49 Pac. Rep. 832.

[54] **Kerr's Cyc. Civ. Code,** § 2920.

[55] **Kerr's Cyc. Code Civ. Proc.,** pt. iii, tit. iv, ch. ii, §§ 1183-1203a.

Colorado. See Johnston v. Bennett, 6 Colo. App. 362, 40 Pac. Rep. 847.

Montana. See Bonner v. Minnier, 13 Mont. 269, 34 Pac. Rep. 30, 40 Am. St. Rep. 441 (dissenting opinion).

[56] Gibson v. Wheeler, 110 Cal. 243, 245, 42 Pac. Rep. 810.

Alaska. Nor would the fact that a building permitted by the owner to become a part of another structure on another's land form the basis of any equitable lien: Chambers v. Hannum, 1 Alas. 468.

Washington. See Fairhaven L. Co. v. Jordan, 5 Wash. 729, 736, 32 Pac. Rep. 729.

[57] Curnow v. Happy Valley etc. Co., 68 Cal. 262, 9 Pac. Rep. 149; Dunlop v. Kennedy (Cal. Sup.), 34 Pac. Rep. 92, 95; Weldon v. Superior Court, 138 Cal. 427, 429, 71 Pac. Rep. 502; and see Brock v. Bruce, 5 Cal. 279, 280.

Colorado. Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 423.

[58] Van Winkle v. Stow, 23 Cal. 458; Booth v. Pendola, 88 Cal. 36, 44, 23 Pac. Rep. 200, 25 Id. 1101.

See §§ 638 et seq., post.

New Mexico. Genest v. Las Vegas Masonic Bldg. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

[59] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[60] See Weldon v. Superior Court, 138 Cal. 247, 249, 71 Pac. Rep. 502.

§ 23. **Nature and scope of right conferred.** It being necessary to look to the statute to ascertain the nature and scope of the right conferred by the mechanic's-lien law, it is found that the mere right of laborers and material-men to assert or create a lien under the California code, unlike that under the statutes of other states, was intended to be personal, and cannot be assigned.[61]

§ 24. **Construction of mechanic's-lien statutes. Scope of discussion.** In this connection will be considered only the general rules applicable to the construction of statutes relating to mechanics' liens and building contracts, leaving to the proper sections specific cases of construction.[62]

[61] Mills v. La Verne L. Co., 97 Cal. 254, 256, 32 Pac. Rep. 169, 33 Am. St. Rep. 168; McCrea v. Johnson, 104 Cal. 224, 225, 37 Pac. Rep. 902. The decisions in these cases went upon the ground that §§ 1183 and 1187 of the Code of Civil Procedure showed an intention that the provisions of the law should be applicable to original claimants only, and that the statute nowhere confers such a right upon an assignee: Rauer v. Fay, 110 Cal. 361, 42 Pac. Rep. 902; Rauer v. Welsh (Cal. Sup., Dec. 10, 1895), 42 Pac. Rep. 904. In Ward v. Crane, 118 Cal. 676, 677, 50 Pac. Rep. 839, claimant's administrator obtained judgment foreclosing the lien. The case of Mills v. La Verne, supra, was distinguished in Duncan v. Hawn, 104 Cal. 10, 12, 37 Pac. Rep. 626 (a suit to enforce a laborer's lien for work done upon a threshing-machine, under Stats. 1885, p. 109), by holding that when the statute requires no step to perfect the lien, but gives such lien ipso facto, or when the lien has been perfected, the lien is not, or ceases to be, personal, and may be assigned. But if, before the lien is perfected, it is assigned to a third party as security merely, and then reassigned to the claimant, who then filed the claim of lien, and transferred the same to plaintiff, the title of plaintiff, and his right to enforce the lien, is established: Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

As to assignment of right created by notice, see § 594, post; see also "Assignees," §§ 588 et seq., post, and "Partners," §§ 44, 585 et seq., post.

Colorado. Lien assignable before being perfected: 3 Mills's Ann. Stats., 2d ed., § 2883; Eagle Gold Min. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 54; Sprague v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 182 (1883, 1889); Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. Rep. 350 (1893).

Montana. Lien is not assignable before being perfected: Mason v. Germaine, 1 Mont. 263, 272 (1865); but is so after being perfected: Davis v. Bilsland, 85 U. S. (18 Wall.) 659, bk. 21 L. ed. 969.

Nevada. Lien assignable: Cutting's Comp. Laws 1900, § 3897; Skyrme v. Occidental M. & M. Co., 8 Nev. 219. In this case the lien had been perfected, and the court held that no particular form of written assignment was necessary.

Oklahoma. "Claims for liens" are assignable: Rev. Stats. 1903 (4820), § 622.

§ 25. Same. Confusion in the authorities. In the California cases, as in those of other states, there is some confusion upon this subject. The rules are variously stated, depending in some instances upon the rule provided by the statute itself, and in others upon the particular provision of the law under investigation. It is also to be observed that the degree or rule of evidence laid down to bring the case within the statute "as construed" is sometimes confounded with the "rule of construction." It was at first held in California, as elsewhere, that this was an extraordinary remedy, in derogation of the common law, and must be strictly construed;[63] but later it was held that such liens

Oregon. Brown v. Harper, 4 Oreg. 89 (decided in 1870).

Utah. Lien is assignable: Rev. Stats., § 1396; Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85 (1890).

Washington. Lien and right to lien are assignable: Pierce's Codes, § 6108. See Fairhaven L. Co. v. Jordan, 5 Wash. 729, 32 Pac. Rep. 729; Casey v. Ault, 4 Wash. 167, 29 Pac. Rep. 1048.

Assignment of moneys to become due under lien as security: Potvin v. Denny Hotel Co., 9 Wash. 316, 36 Pac. Rep. 320, 38 Id. 1002.

[62] See, generally, "Construction of Claim," § 371, post, and "Construction of Contracts," § 216, post.

Colorado. Mouat L. Co. v. Gilpin, 4 Colo. App. 534, 36 Pac. Rep. 892.

Utah. Cary-Lombard L. Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572; Morrison v. Cary-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238.

To arrive at the legislative intent, the court cannot segregate a section or a part of a chapter on the subject, but the object of the law as a whole must be considered. In relation to the mechanic's-lien statute, courts should not withhold the benefits intended by a series of sections on one subject by a too limited or strict construction of one section or part of a whole series, so as to destroy the intended effects of other parts. Where the statute fails, courts cannot create rights, and should not do so by unnatural or forced construction. Rev. Stats. 1898, tit. xxxix, ch. i, prescribes the methods of procuring such liens, and provides the procedure to enforce them as against the property, the owner, and among other claimants, and must be construed on the theory that some of the provisions are intended for the owner and others intended for the claimants. Some of these provisions may be, and frequently are, intended for the benefit of some who stand in a particular relation, and not to others standing in a different relation to either the owner or the property. A lien, once acquired by labor performed on a building with the consent of the owner, should not be defeated by technicalities, when no rights of others are infringed, and no express command of the statute is disregarded: Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713, 716.

[63] Walker v. Hauss-Hijo, 1 Cal. 183, 185; Bottomly v. Rector etc. of Grace Church, 2 Cal. 90, 92.

Colorado. Sayre-Newton L. Co. v. Park, 4 Colo. App. 482, 36 Pac. Rep. 445; Arkansas R. L. Reservoir and Canal Co. v. Flinn, 3 Colo. App. 381.

should be favored in the law.[64] After the adoption of the California codes, a substantial compliance only was re-

It should be strictly construed as against a purchaser without knowledge of the lien: Anderson v. Bingham, 1 Colo. App. 222, 28 Pac. Rep. 145.

Liberal construction when; strict when. It should be liberally construed as to the remedial portion of it, but it must be strictly construed in determining the question as to whether a right to a lien exists. Where the inquiry is, whether a person asserting a lien, or the work for which he claims it, comes within the statute, or whether the statutory requirements necessary to initiate the lien have been complied with, the statute must be strictly construed: Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403; Sprague Inv. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 184 (as to perfecting the right); and the right to the lien is strictly construed in determining the cases within it: Fleming v. Prudential Ins. Co. of Am., 19 Colo. App. 126, 73 Pac. Rep. 752.

Hawaii. All the provisions of the statute must be strictly construed: Lucas v. Redward, 9 Hawn. 23, 25; Allen v. Redward, 10 Hawn. 151, 159.

Idaho. White v. Mullins, 3 Idaho 434, 31 Pac. Rep. 801; Bradbury v. Idaho & O. L. Imp. Co., 2 Idaho 239, 10 Pac. Rep. 620.

Montana. See Richards v. Lewisohn, 19 Mont. 128, 47 Pac. Rep. 645; Black v. Appolonio, 1 Mont. 342 ("strictly pursued" and "liberally construed" — a case of forfeiture); Smith v. Sherman M. Co., 12 Mont. 524, 31 Pac. Rep. 72; Murray v. Swanson, 18 Mont. 533, 46 Pac. Rep. 441.

Claimant required to comply strictly with statute as to notice to owner: Whiteside v. Lebscher, 7 Mont. 473, 17 Pac. Rep. 548.

New Mexico. Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586 (dissenting opinion). **Contra:** Hobbs v. Spiegelberg, 3 N. M. 222, 5 Pac. Rep. 529 (as to statute being in derogation of common law); Finane v. Las Vegas Hotel & Imp. Co., 3 N. M. 256, 5 Pac. Rep. 725, considered in Minor v. Marshall, 6 N. M. 194, 27 Pac. Rep. 481.

Oregon. Kendall v. McFarland, 4 Oreg. 292, 293; Dalles L. & M. Co. v. Wasco W. Mfg. Co., 3 Oreg. 527. See Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305.

[64] Tuttle v. Montford, 7 Cal. 358, 360 (question of priority).

The struggle of two contending principles manifests itself. On the one hand, it became necessary to protect the rights of owners of property from subtile encroachments, and on the other, to carry out the true spirit of the law and the intention of the legislature. Parts of the same statute were construed strictly or liberally, as the case might be, without reference to any distinct principle: See Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 205, 50 Pac. Rep. 744. Thus in McAlpin v. Duncan, 16 Cal. 127, it was again held that the law was in derogation of the common law, and should be strictly construed; but as the facts show that a double payment was demanded from the owner, which, of course, was a penalty, the case will be seen to fall within the modern rule, although the general principle stated in the case is no longer held; but in Davis v. Livingston, 29 Cal. 283, 287 (and see Henley v. Wadsworth, 38 Cal. 356, 362), under the act of 1862, strict compliance with all the provisions of the statute was again required. In a later case, under the act of 1867-68, the court returned somewhat to the doctrine of Tuttle v. Montford, supra, and it was held that only a substantial observance of the provisions of the statute was required: Wood v. Wrede, 46 Cal. 637.

quired,[65] and subsequently (1885) the legislature amended section eleven hundred and eighty-four of the Code of Civil

Colorado. It should be liberally construed, to advance its objects: Rico Reduction & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458; but cannot be extended by construction to cases not provided for by the statute: Barnard v. McKenzie, 4 Colo. 251, 252. "It must also be conceded to be the settled policy in this state . . . to favor the enforcement of mechanics' liens, when the lien has once attached, by a liberal construction of the statute, so as to advance its objects: Barnard v. McKenzie, 4 Colo. 251; Williams v. Uncompahgre C. Co., 13 Colo. 469, 22 Pac. Rep. 806; Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456; Empire L. & C. Co. v. Engley, 18 Colo. 388, 33 Pac. Rep. 153; Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64. We do not regard Arkansas R. L. R. & C. etc. Co. v. Flinn, 3 Colo. App. 381, 33 Pac. Rep. 1006, and Rice v. Carmichael, 4 Colo. App. 84, 34 Pac. Rep. 1010, as being in conflict with these cases. . . . The language of the court applies to antecedent acts, which the statute imperatively requires to be done by the party seeking to establish a lien before the lien is created": Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 204, 50 Pac. Rep. 744. See also Hanna v. Colorado Sav. Bank, 3 Colo. App. 28, 31 Pac. Rep. 1020; Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 791.

Rules of construction. Liberal and strict. When a lien has been lawfully acquired, for the purpose of its enforcement the statute will be liberally construed, but yet, since the object of the law is in invitum to charge the property of one with a liability for a debt of another, persons claiming its benefit must bring themselves clearly within its purview, as belonging to some of the classes in whose favor the right is allowed: Pitschke v. Pope, 20 Colo. App. 328, 78 Pac. Rep. 1077. The remedial portions of the statute should be liberally construed; the other parts — those upon which the right to the existence of the lien depends — being in derogation of the common law — should be strictly construed. That part of the statute in question is not remedial, but pertains wholly to the acquirement of the lien: Maher v. Shull, 11 Colo. App. 322, 52 Pac. Rep. 1115.

Construction of proviso, Sess. Laws 1895, § 8, p. 202, as to lien on mines: See Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612.

Idaho. Liberally construed: Phillips v. Salmon R. M. & D. Co., 9 Idaho 149, 72 Pac. Rep. 886, citing Rev. Stats. 1887, § 4; Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 59 C. C. A. 200; Flagstaff M. Co. v. Cullins, 104 U. S. 176, 26 L. ed. 704 (with reference to the persons entitled).

Montana. Liberally construed: Davis v. Alvord, 94 U. S. 545, bk. 24 L. ed. 283.

Nevada. Liberally construed: Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. Rep. 50; Lonkey v. Wells, 16 Nev. 271, 274; Hunter v. Truckee Lodge, 14 Nev. 24, 28 (time of filing claim); Skyrme v. Occidental M. & M. Co., 8 Nev. 219, 221.

So construed as to protect lien claimants of whatever kind, whether contractors, machinists, material-men, or laborers, — the law should be; and liberally construed to effect its object and promote justice: Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632 (Cir. Ct., Nev.).

Oregon. See Nicolai Bros. Co. v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288.

[65] Hooper v. Flood, 54 Cal. 218, 221; Blackman v. Marsicano, 61 Cal. 639, 640, following **Kerr's Cyc. Code Civ. Proc.,** § 4.

Procedure, so as to require only a substantial compliance with that section, so far as the contract, payments, and notice to the owner are concerned; but later it was held that the provisions of the code relating to the claim of lien are to be liberally construed, with the view to effect its objects and promote justice.[66] However, it was subsequently said, in reference to the claim of lien, that, although the rule had been somewhat relaxed in favor of liens under the chapter on mechanic's liens, very great strictness of perform-

Alaska. Substantial observance; whatever is made necessary to the existence of the lien must be complied with or the attempt to create it will be futile: Jorgensen Co. v. Sheldon, 2 Alas. 607, 610; Russell v. Hayner, 130 Fed. Rep. 90, 64 C. C. A. 424, 2 Alas. 702, 703 (Dig.).

Oklahoma. The court said, as to the persons entitled, contractors and material-men: "It is true that the statute should not be enlarged beyond its provisions; but it is equally true that it should not receive such a narrow construction as to exclude from its application persons or classes who are intended to be placed within its protection. The rule that statutes in derogation of the common law shall be strictly construed has no application here. This statute under contemplation should receive a liberal interpretation. Of course, it should not be so construed as to reach out and bring within its provisions persons not included within it, or so as to confer special privileges upon them": Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170, 172. Substantial compliance (as to claim of lien): Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303; Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

Oregon. Substantial compliance: Nicolai Bros. Co. v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288; Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305; Allen v. Rowe, 19 Oreg. 188, 23 Pac. Rep. 901.

New Mexico. Substantial compliance: Springer L. Assoc. v. Ford, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. Rep. 170.

Utah. Where the statute requires certain things to be done to acquire a right, there must be a substantial compliance with the statute, but where the statue requires certain things to be done in case certain conditions exist, the statute is not operative, unless the conditions are present: Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713, 718.

Washington. Substantial compliance: McHugh v. Slack, 11 Wash. 370, 372, 39 Pac. Rep. 674; Gen. Stats., § 1667.

Wyoming. Substantial compliance with all the essential requirements of the statute: Wyman v. Quale, 9 Wyo. 326, 63 Pac. Rep. 988.

[66] Treddinick v. Red Cloud M. Co., 72 Cal. 78, 80, 13 Pac. Rep. 152 (1887); Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1078, aff. sup. ct., 89 Pac. Rep. 1081.

Colorado. Substantial compliance to lay the foundation of lien: Greeley S. L. & P. R. Co. v. Harris, 12 Colo. 226 (1881), 20 Pac. Rep. 764; Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456; Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744.

See note 64, ante, this section.

ance is generally exacted.[67] But again it was said that it was a remedial statute, adopted in obedience to the constitution of California,[68] and is to be liberally construed, in furtherance of the purpose for which it is authorized.[69] This language was used with reference to the claim of lien, and is

Idaho. Colorado Iron Works v. Riekenberg, 4 Idaho 262, 38 Pac. Rep. 651, 652.

Nevada. Construed to effect substantial justice (claim of lien): Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632, 638 (Cir. Ct., Nev.). See Skyrme v. Occidental M. Co., 8 Nev. 219, 239.

New Mexico. Liberally construed: Mountain Electric Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284, 285; Ford v. Springer L. Assoc., 8 N. M. 48, 41 Pac. Rep. 541, **overruling** Finane v. Hotel Co., 3 N. M. 256, 5 Pac. Rep. 725 (which required strict construction). See Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586; Minor v. Marshall, 6 N. M. 194, 27 Pac. Rep. 481 (substantial compliance; "strict" and "liberal" construction depends upon the facts in each specific case). Remedial, and construed to effectuate object: Springer L. Assoc. v. Ford, 168 U. S. 513, bk. 2 L. ed. 562, 18 Sup. Ct. Rep. 170.

Utah. Remedial provisions liberally construed: Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605, 607.

Washington. Liberally construed (claim of lien): Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719; Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001.

[67] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431.

Oregon. In Willamette S. M. L. & Mfg. Co. v. Shea, 24 Oreg. 40, 53, 32 Pac. Rep. 759, it was said: "While we have required those who would receive the benefit of the statute to comply with its positive requirements in order to acquire a valid lien (Gordon v. Deal, 23 Oreg. 153, 31 Pac. Rep. 287; Nicolai Bros. Co. v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288), we think a more liberal rule should prevail as to those parts of the statute less definite, which to rigorously enforce would deprive the claimant of its benefits."

[68] Const. Cal. 1879, art. xx, § 15, **Henning's Gen. Laws Cal.**, p. civ.

[69] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873 (claim of lien); McGinty v. Morgan, 122 Cal. 103, 54 Pac. Rep. 392 (claim of lien); Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74 (claim of lien); Macomber v. Bigelow, 126 Cal. 9, 16, 58 Pac. Rep. 312 (claim of lien); Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1078, **affirmed** in supreme court, 89 Pac. Rep. 1081; Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 78 Pac. Rep. 21 (claim of lien); Southern Cal. L. Co. v. Peters, 3 Cal. App. 478, 86 Pac. Rep. 816; Valley L. Co. v. Wright, 2 Cal. App. 288, 84 Pac. Rep. 58; Newell v. Brill, 2 Cal. App. 61, 62, 83 Pac. Rep. 76 (hearing in supreme court denied — claim of lien).

See §§ 28-38, ante.

Alaska. The courts, in fixing the rule of construction of these laws, look to the statutes themselves to ascertain whether they should be strictly or liberally interpreted: held, that the lien law of Alaska should be liberally construed; the court saying, "The evident spirit and purpose of the act is to do substantial justice to all parties who may be affected by its provisions, and the courts should avoid unfriendly strictness and mere technicality": Russell v. Hayner, 130 Fed. Rep. 90, 64 C. C. A. 424, 2 Alas. 702, 703 (Dig.); Jorgensen v. Sheldon, 2 Alas. 607, 609; but in following this rule, courts should

possibly practically identical with the doctrine of "substantial compliance," and the expressions seem to be used interchangeably in the decisions.[70] "While the courts always require a substantial compliance with the statute in regard to the statement in the notice of lien and the proceedings thereunder, yet they will not give the statute such a narrow or technical construction as to fritter away, impede, and destroy the right of the lien claimant."[71]

§ 26. **Same. Penal provisions.** The language used will always be construed in the light of the purpose to be

always be careful not to impair the balance of the statute, or fritter away its meaning by construction: Russell v. Hayner, supra.

Colorado. See Greeley S. L. & P. R. Co. v. Harris, 12 Colo. 226, 20 Pac. Rep. 764.

Montana. In so far as the granting of the lien is concerned, the statute is remedial in character, and should be liberally construed; and in so far as the procedure is concerned, by which the lien is claimed or enforced, the statute should be strictly followed: Western Iron Works v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 416.

While the statute is in some respects remedial in its nature, and thus far should be construed liberally, it creates a new right, and the procedure by which this new right is perfected and enforced must be strictly followed: McGlaughlin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428. See Yerrick v. Higgins, 22 Mont. 502, 57 Pac. Rep. 95, 98; Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 991; Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678.

"Remedial": See Richards v. Lewisohn, 19 Mont. 128, 47 Pac. Rep. 645; Black v. Appolonio, 1 Mont. 342.

New Mexico. "Remedial": Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541; Genest v. Las Vegas Masonic B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

Oregon. "Remedial," and should receive a liberal construction: Ainslie v. Kohn, 16 Oreg. 363, 371, 19 Pac. Rep. 97 (claim of lien). See Nicolai Bros. Co. v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288.

Washington. All the provisions of the chapter are to be liberally construed: Pierce's Code, § 6119. See Gates v. Brown, 1 Wash. 470, 474; Kellogg v. Little and Smythe Mfg. Co., 1 Wash. 407, 25 Pac. Rep. 461.

[70] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 595, 25 Pac. Rep. 747; Hagman v. Williams, 88 Cal. 146, 151, 25 Pac. Rep. 1111; Yancy v. Morton, 94 Cal. 558, 561. See Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072; Castagnetto v. Coppertown M. & L. Co., 146 Cal. 328, 332, 80 Pac. Rep. 74; Meyer v. Quiggle, 140 Cal. 495, 497, 74 Pac. Rep. 40; San Francisco Pav. Co. v. Fairfield, 134 Cal. 222, 224, 66 Pac. Rep. 255 (claim of lien); Santa Cruz Rock Pav. Co. v. Lyons, 133 Cal. 114, 119, 65 Pac. Rep. 329 (claim of lien).

See also "Original Contract," §§ 194, 211, post; "Claim," §§ 370 et seq., post, and "Waiver and Forfeiture," §§ 627 et seq., post.

[71] Castagnetto v. Coppertown M. & L. Co., 146 Cal. 329, 80 Pac. Rep. 74 (claim of lien), **citing** Ascha v. Fitch (Cal., Oct. 6, 1896), 46 Pac. Rep. 298; Hagman v. Williams, 88 Cal. 146, 25 Pac. Rep. 1111; Russ

effected. "The statute, imposing as it does a liability upon the owner beyond the price he contracted to pay, in favor of a subcontractor with whom he has no contractual relation, is penal as well as remedial, and therefore, whilst it must have such construction as will reasonably effectuate its remedial purposes, it must be strictly confined to such purposes. No merely technical construction can be indulged for the purpose of visiting a penalty upon the owner, unless there has been a substantial failure to comply with the law, such as, if continued, would defeat the remedial purposes of the statute; but if there be a reasonable doubt as to the construction of the statute, or as to whether the defendants [owners] complied with it, they should have the benefit of it."[72] So far as the statute has the effect of compelling the owner to pay more than he agreed to pay, or to pay his debt twice, it is highly penal, and should be strictly construed in his favor. Those who seek to inflict upon him a penalty for his failure to comply with the terms of the law must show clearly that a dereliction has occurred. The law must be construed against the exaction of the penalty, if for any reason it can be.[73] And so the penal provisions rendering the contract void are to be strictly construed, and every reasonable intendment made to avoid such a penalty.[74]

L. & M. Co. v. Garrettson, 87 Cal. 589, 595, 25 Pac. Rep. 747; McGinty v. Morgan, 122 Cal. 103, 105, 54 Pac. Rep. 392; Macomber v. Bigelow, 126 Cal. 9, 58 Pac. Rep. 312.

[72] Joost v. Sullivan, 111 Cal. 286, 296, 43 Pac. Rep. 896. See Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072. In Reese v. Bald Mountain Consol. G. M. Co., 133 Cal. 285, 290, 65 Pac. Rep. 578, it was said: "The party desiring to hold and enforce a lien upon the property of one who did not employ him must bring himself clearly within the terms of the statute." Quære: Is this an intimation that a different rule should apply to subclaimants than to original contractors? But see Union L. Co. v. Simon (Cal. Sup.), 89 Pac. Rep. 1081.

See § 16, ante, and authorities.

New Mexico. See dissenting opinion, Minor v. Marshall, 6 N. M. 194, 27 Pac. Rep. 481, where this rule is also laid down.

Oregon. See Kezartee v. Marks, 15 Oreg. 529, 534, 16 Pac. Rep. 407.

[73] West Coast L. Co. v. Knapp, 122 Cal. 81, 54 Pac. Rep. 533; Hampton v. Christensen, 148 Cal. 729, 734, 84 Pac. Rep. 200.

[74] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431; West Coast L. Co. v. Knapp, 122 Cal. 81, 54 Pac. Rep. 533; Brill v. De Turk, 130 Cal. 241, 243, 62 Pac. Rep. 462 (provision as to payments, under **Kerr's Cyc. Code Civ. Proc.**, § 1184 — substantial compliance required).

The same is true as to the provision for the forfeiture of liens of claimants.[75] It has also been said in reference to the strict construction of the penal provisions, "There may be some doubt whether this rule of construction, which obtained before the codes were adopted, is to be given its full force under the provisions of the code.[76] . . . But, however this may be, it will be conceded that such statutes should not receive a construction unduly favoring the imposition of a penalty or forfeiture. And in the case of a statute which deals with the constitutional right of an owner of property to make contracts relating to its use and enjoyment, the restriction of the right can go only to the form of the contract,[77] and cannot be extended by construction beyond what is expressed."[78]

§ 27. **Same. Résumé.** What the courts have said having been set forth, it will be observed that, except at certain points, there has been considerable wavering, and no attempt will be made to reconcile what appears conflicting. The following tentative suggestion is, however, made, and is considered fair, in the light of the language used in the decisions:

1. **As to the elements creating the inchoate right to the lien,** the statute should be strictly construed: (a) As to the classes of persons entitled to a lien; (b) As to the nature of the labor for which the lien is given; (c) As to the object

[75] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 365, 29 Pac. Rep. 622. See "Forfeiture," §§ 632 et seq., post.

Alaska. Where a particular enactment deals fairly and equitably with both owner and the lienor, liberal interpretation seems to be the rule adopted; but where a statute seems to be unnecessarily severe upon one, and in favor of the other, resulting in manifst injustice, the courts have endeavored to relieve the severity, holding the party favored to a strict compliance with the statute: Jorgensen v. Sheldon, 2 Alas. 607, 608.

Colorado. Same principle as text: See Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

[76] **Kerr's Cyc. Code Civ. Proc.,** § 4.

[77] Stimson M. Co. v. Braun, 136 Cal. 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

[78] Snell v. Bradbury, 139 Cal. 379, 381, 382, 73 Pac. Rep. 150 (construing the penal provisions of § 1183, **Kerr's Cyc. Code Civ. Proc.,** as to the validity of the contract).

upon which the labor is done or for which the materials are furnished; (d) As to the character of the materials for which a lien is given; — provided that constitutional mandatory liens should be construed in the light of the constitutional provision.[79]

2. **As to the perfection of the lien,** the right to perfect the same having been acquired, a more liberal rule of construction should be adopted to carry out the objects of the legislation and promote justice, but there must be a substantial compliance with the statute.

3. **After the lien is perfected** and the right is fully matured, it should be regarded with as much favor and as carefully protected as any other right guaranteed by the constitution, and should be governed by the general rules applicable to any other right under similar circumstances.

4. **Where there is a penal provision,** it should be strictly construed, whether that provision is: 1. As to the lien or the original contract; 2. Against the owner or against the claimant; or 3. Whether under a provision of the constitution creating such a lien or under a statute carrying the constitution into effect which provides for a liberal rule of construction.

5. **As to the extent of the lien,** whether as to the amount for which the owner or his land is liable, or as to priorities between the claimants themselves, or as against third persons, substantial justice to all parties, invoking the usual rules of law and principles of equity, should be the guide. The lien being in existence, the right being created, whether it attaches to a thing of greater or less value, or perhaps of no value, such as, for instance, a defaulted leasehold interest, no higher standing in the law should be given to it, than to any contractual right under similar circumstances, unless by virtue of an express valid provision of the statute.

[79] See "Persons Entitled," §§ 45 et seq., post; "Nature of Labor," §§ 130 et seq., post; "Object on Which Labor is Done," §§ 166 et seq., post; and "Nature of Materials," §§ 87-91, post.

6. **As to the remedial provisions** of the statute, namely, those relating to procedure, under the reformed codes of procedure, as well as under an express provision for liberal construction contained in the statute itself, an equally liberal rule of interpretation should prevail, whether the provision is contained in the act creating the mechanic's lien, or refers to the general code of procedure.[80]

[80] For procedure, see, generally, **Kerr's Cyc. Code Civ. Proc.**

CHAPTER II.

CONSTITUTIONAL ASPECTS, AND THE LAW APPLICABLE.

§ 28. Constitutional provisions creating the lien.
§ 29. Same. Operation of the constitution.
§ 30. Raising question of constitutionality.
§ 31. Constitutionality of lien statutes generally.
§ 32. The contractual relation.
§ 33. Same. Valid contract.
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§ 39. Contractor's bond.
§ 40. Attorneys' fees and costs.
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§ 28. Constitutional provisions creating the lien.[1] Respecting mechanics' liens the California constitution contains the following provisions: "Mechanics, material-men, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens."[2] "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . .

[1] **As to validity of building regulations,** see, generally, note 93 Am. St. Rep. 405.

See also "Persons Entitled," §§ 42-44, post.

[2] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws,** p. civ.

The California constitution of 1849 did not provide for securing to mechanics or material-men a lien for their work or material; the subject was left to the wisdom of the legislature: Latson v. Nelson (Cal.), 11 Pac. Coast L. J. 589.

This subject is more fully developed under the head of "Persons Entitled," §§ 42 et seq., post.

Constitutions of other states. The constitution of North Carolina, art. xiv, § 4, also provides for such liens. But see constitution of Texas, art. xvi, § 37, and constitution of Louisiana of 1898, art. clxxxv; and see also Camp v. Mayer, 47 Ga. 414, and Stonewall Jackson L. & B. Assoc. v. McGruder, 43 Ga. 9, decided under constitution of Georgia 1868, art. i, § 30.

Twenty-fourth — Authorizing the creation, extension, or impairing of liens." [3] Although it has been intimated in various decisions that any law relative to mechanics' liens derives its being from the California constitution,[4] yet it is to be observed that some of the liens created by the California Code of Civil Procedure [5] are mentioned in the constitution, and others are not. The liens of material-men,[6] mechanics, artisans, and laborers of every class, for work done or materials furnished by them personally, are provided for by the constitution.[7]

A lien is not given to contractors and subcontractors, as such, by the constitution. If the contractor or subcontractor personally labors in the erection of a building or improvement, or furnishes materials used therein, it may be that he would have a lien, under the constitution, for the value of such labor or material, but it would not be given by virtue of his contract or to the amount of the contract price. His right to a lien under the contract is given solely by the statutory provisions in his behalf. The constitutional mandatory liens all stand upon the same footing, and they are equal in point of rank with regard to one another.[8] This constitutional right extends to the value of all labor and materials bestowed or furnished, and, under the statute, such value is the measure of the recovery.[9]

§ 29. Same. Operation of the constitution. It was not the intention of the new constitution of California to repeal

[3] Cal. Const. 1879, art. iv, § 25, **Henning's General Laws,** p. lxxiii.

[4] For instance, Builders' Supply Depot v. O'Connor (Cal. Sup.), 88 Pac. Rep. 982, 985; Bennett v. Beadle, 142 Cal. 239, 242, 75 Pac. Rep. 843 (lien on vessel).

[5] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1203a.

[6] Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681. And see Stimson M. Co. v. Nolan (Cal. App.), 91 Pac. Rep. 262 (laborer and materialman); Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.

[7] Miltimore v. Nofziger Bros. L. Co. (Cal. Sup.), 90 Pac. Rep. 114; Hampton v. Christensen, 148 Cal. 729, 737, 84 Pac. Rep. 200; and see Gibbs v. Tally, 133 Cal. 373, 377, 65 Pac. Rep. 970, 60 L. R. A. 815.

[8] Miltimore v. Nofziger Bros. L. Co. (Cal. Sup., April 2, 1907), 90 Pac. Rep. 114; Stimson M. Co. v. Nolan (Cal. App., June 17, 1907), 91 Pac. Rep. 262.

[9] Stimson M. Co. v. Nolan (Cal. App., June 17, 1907), 91 Pac. Rep. 262.

or abrogate the law giving liens to mechanics upon real property, then found in the California Code of Civil Procedure.[10] Such law was preserved in full force and effect by the present constitution, which declares "that all laws in force at the adoption of this constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the legislature."[11] The mechanic's-lien law in force at the time of the adoption of the present constitution was not in conflict but in harmony with it.[12]

Constitution not self-executing. But the provision of the constitution under consideration[13] is not, and does not profess to be, self-executing; it commands legislation on the subject,[14] and it is the legislative function to provide a system through which the rights guaranteed may be executed and carried into effect.[15] Every provision of the laws which the legislature may enact must be subordinate to and in consonance with this constitutional provision,[16] which, however, itself, is subordinate to the declaration of rights contained in the same instrument.[17]

[10] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1199. See Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 354.

[11] Cal. Const., art xxii, § 1, **Henning's General Laws,** p. cvi.

[12] Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 354. See Peckham v. Fox, 1 Cal. App. 307, 308, 82 Pac. Rep. 91.

Shortly after the present constitution was adopted, the court held that it was not intended to repeal the statute theretofore existing, but to continue and make it permanent, with the construction it had received, and that it was not intended to enlarge, but to fix: Latson v. Nelson, 11 Pac. Coast L. J. 589 (some of the doctrines of this case have been questioned by later cases).

See also "Law Applicable," §§ 36-38, post.

[13] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws,** p. civ.

[14] Morse v. De Ardo, 107 Cal. 622, 623, 40 Pac. Rep. 1018; Morris v. Wilson, 97 Cal. 644, 646, 32 Pac. Rep. 801; Spinney v. Griffith, 98 Cal. 149, 151, 32 Pac. Rep. 974.

In the case last cited it is said that this section of the constitution is inoperative, except as supplemented by legislation; but this language seems to be unfortunate, and opposed to the cases cited therein, which hold that the legislation in force at the adoption of the constitution was continued; and this is what was probably intended by the court. See also Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 78 Pac. Rep. 21, and Camp v. Mayer, 47 Ga. 414.

[15] Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681, 683.

[16] Hampton v. Christensen, 148 Cal. 729, 737, 84 Pac. Rep. 200.

[17] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726. But see Stimson M. Co. v. Nolan (Cal. App.), 91 Pac. Rep. 262.

§ 30. **Raising question of constitutionality.** In raising the question of the constitutionality of the statute regulating mechanics' liens, a party is limited solely to the inquiry as to whether, in the case which he presents, the effect of applying the statute is to deprive him of his constitutional rights, as by taking his property without due process of law.[18] He has no right to assert that the statute is unconstitutional because it may be construed so as to cause it to violate a provision of the constitution.[19]

§ 31. **Constitutionality of lien statutes generally.** Many attacks have been made upon mechanic's-lien statutes[20] in

[18] Ramish v. Hartwell, 126 Cal. 443, 451, 58 Pac. Rep. 920, following Costillo v. McConnico, 168 U. S. 674, 680, bk. 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

Colorado. See Gutshall v. Kormaley (Colo.), 88 Pac. Rep. 158.

[19] Ramish v. Hartwell, supra, **following** Costillo v. McConnico, supra.

Colorado. Where the question as to the constitutionality of the act was not raised in the lower court, the appellate court refused to consider it for the first time on appeal: Miller v. Thorpe, 4 Colo. App. 559, 561, 36 Pac. Rep. 891 (3 Mills's Ann. Stats., 1st ed., act of 1889, § 2867), the objection being that it was against public policy. Where the petition for the writ of error presents solely the question of the validity of the provision of the act allowing attorneys' fees, the constitutionality of which had been determined by the court, it was held that nothing was involved to give the court jurisdiction, and the writ was dismissed: Campbell v. Los Angeles G. M. Co., 28 Colo. 256, 64 Pac. Rep. 194.

[20] **Constitutionality** of mechanic's-lien laws is generally upheld: See Prince v. Neal-Millard Co., 124 Ga. 884, 4 Am. & Eng. Ann. Cas. 615.

As to valid mechanic's-lien laws, see note 4 Am. & Eng. Ann. Cas. 620.

As to invalid mechanic's-lien laws, see note 4 Am. & Eng. Ann. Cas. 621.

The California act of 1868 did not, because it failed to give a lien to laborers and those working on mining claims, violate the provisions of the constitution of 1849, requiring that "all laws of a general nature shall have a uniform operation": Quale v. Moon, 48 Cal. 478, 482.

Compare: Cal. Const. 1879, art. i, § 11, **Henning's General Laws,** p. lxvi.

The act approved March 29, 1897 (Stats. 1897, p. 231), giving laborers employed by corporations a general lien on all the property of a corporation an apparent priority over other liens provided for in §§ 1183-1203a of **Kerr's Cyc. Code Civ. Proc.** has been declared unconstitutional: Johnson v. Goodyear M. Co., 127 Cal. 4, 10, 59 Pac. Rep. 304, 47 L. R. A. 338.

A previous act of a similar nature (Stats. 1891, p. 195) was also held unconstitutional: Slocum v. Bear Valley Irr. Co., 122 Cal. 555, 55 Pac. Rep. 403, 68 Am. St. Rep. 68; Worden v. Bear Valley Irr. Co., 55 Pac. Rep. 1099. See Ackley v. Black Hawk G. M. Co., 112 Cal. 42,

the various jurisdictions, as well as upon other statutes bearing some relation to them,[21] as being opposed to the

44; Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 631, 43 Pac. Rep. 14; Spaulding v. Mammoth Spring M. Co. (Cal.), 49 Pac. Rep. 183.

Colorado. See Davis v. Mouat L. Co., 2 Colo. App. 381, 31 Pac. Rep. 187 (due process of law). As to the constitutionality of:

Act of 1883: See Sprague Invest. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 181, referring to s. c. 7 Colo. App. 152, 42 Pac. Rep. 1040; Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989, 990.

Act of 1889: Chicago L. Co. v. Dillon, supra; Antlers Park Regent M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226, 227.

Stats. 1903, p. 315, ch. cxvii: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789 (referring to the California statute and Kellogg v. Howes, 81 Cal. 170, 22 Pac. Rep. 509, 6 L. R. A. 588); Joralmon v. McPhee, 31 Colo. 26, 40, 71 Pac. Rep. 419, 76 Pac. Rep. 922.

Constitutionality of this class of legislation is too well settled to admit of discussion: Church v. Smithea, 4 Colo. App. 175, 35 Pac. Rep. 267 (1883).

Courts universally uphold it, and many express a very strong conviction regarding its propriety: Church v. Smithea, supra. See Turner v. Robbins, 78 Ala. 592; Wimberly v. Mayberry, 94 Ala. 240, 10 So. Rep. 157; McAllister v. Clopton, 51 Miss. 257; Cement Co. v. Morrison, 13 N. J. Eq. 133; Brooks v. Burlington & S. W. R. Co., 101 U. S. 443, bk. 25 L. ed. 1057.

As to such statutes being special or class legislation, see Rice v. Carmichael, 4 Colo. App. 86, 34 Pac. Rep. 1010; Anderson v. Bingham, 1 Colo. App. 222, 28 Pac. Rep. 145.

Washington. The law-making power may put such restrictions upon the enforcement of such statutes as it chooses, however far such restrictions may depart from the established rules of law, so long as they violate no constitutional rights: Marks v. Pence, 31 Wash. 426, 71 Pac. Rep. 1096. See, generally, Kellogg v. Littell & S. Mfg. Co., 1 Wash. 407, 410, 25 Pac. Rep. 461.

[21] **Stats. 1901, ch. cexii, p. 641,** requiring architects to be certified, held constitutional: Ex parte McManus (Cal. Sup.), 90 Pac. Rep. 702.

Stats. 1897, p. 231, requiring all corporations to pay employees at least once a month, etc., held to be in violation of the constitution of California and the constitution of the United States: Johnson v. Goodyear M. Co., 127 Cal. 4, 59 Pac. Rep. 304, 47 L. R. A. 338.

As to validity of statute of February 27, 1893 (Stats. 1893, p. 33, **Henning's General Laws,** p. 1311), relating to street assessments, see Ramish v. Hartwell, 126 Cal. 443, 450, 58 Pac. Rep. 920.

Colorado. Sess. Laws 1899, ch. ciii, restricting hours of labor in a mine, etc., held unconstitutional: In re Morgan, 26 Colo. 415, 58 Pac. Rep. 1071, 47 L. R. A. 52.

Compare: "Nevada" and "Washington," this note.

Montana. Laws 1905, ch. 1, p. 105, relating to employment in mines and smelters, held constitutional: State v. Livingston C. B. & M. Co. (Mont.), 87 Pac. Rep. 980.

Utah. Act of March 30, 1896, providing for hours of employment in mines, etc., held constitutional: Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; and see State v. Holden, 14 Utah 71, 95, 46 Pac. Rep. 762.

Federal and state constitutions.[22] Thus the act of 1868,[23] which formed the basis of the present California statute, was attacked as unconstitutional upon the following grounds: That it attempts to appoint agents for private persons; that it confiscates property; that it attempts to take away vested rights and to clothe private persons with power to divest citizens of their property. But the constitutionality of the statute, as against these objections, was sustained.[24]

[22] **Nevada.** Act of February 23, 1903 (Stats. 1903, ch. x, p. 33), imposing a penalty on one working more than eight hours in a mine, etc., held not unconstitutional, as against many objections urged: Ex parte Kair, 28 Nev. 425, 82 Pac. Rep. 453, 80 Id. 463; In re Boyce, 27 Nev. 299, 75 Pac. Rep. 1.

Washington. City ordinance making eight hours a day's work, not repugnant to the fourteenth amendment of the constitution of the United States, nor to similar provision in the state constitution: In re Broad, 36 Wash. 449, 78 Pac. Rep. 1004, 70 L. R. A. 1011.

Act of March 9, 1905, amending act to provide for the payment of wages of laborers by corporations by orders, etc., amending § 3305 of Ballinger's Ann. Codes and Stats. (Laws 1905, ch. cxii, p. 219), held not unconstitutional as depriving a person of property without due process of law: Shortall v. Puget Sound Bridge & D. Co. (Wash.), 88 Pac. Rep. 212.

The employee's act of 1897, held constitutional: Blumauer v. Clock, 24 Wash. 596, 64 Pac. Rep. 844, 85 Am. St. Rep. 966.

A city ordinance prohibiting laborers from working more than eight hours a day on public work, held unconstitutional, as interfering with the constitutional right to contract: City of Seattle v. Smyth, 22 Wash. 327, 60 Pac. Rep. 1120, 79 Am. St. Rep. 939.

Compare: Ex parte Kuback, 85 Cal. 274, 24 Pac. Rep. 737, 20 Am. St. Rep. 226, 9 L. R. A. 482.

Laws 1893, ch. xxiv, p. 32, § 1, that part relating to liens for "provisions" furnished, held unconstitutional: Armour v. Western Cons. Co., 36 Wash. 529, 78 Pac. Rep. 1106.

Laws 1897, p. 55, § 1, providing for general liens for labor done for railway, canal, and other corporations, held constitutional: Fitch v. Applegate, 24 Wash. 25, 31, 64 Pac. Rep. 147.

As to the constitutionality of Session Laws 1895, p. 142, concerning drainage-ditches, see State v. Henry, 28 Wash. 38, 68 Pac. Rep. 368.

[23] Cal. Stats. 1868, p. 589.

[24] Hicks v. Murray, 43 Cal. 515, 521, **cited** in Jones v. Great Southern F. H. Co., 86 Fed. Rep. 370, 382, 30 C. C. A. 108, 58 U. S. App. 397, **reversing** 79 Fed. Rep. 445, 447 (Cir. Ct.), 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576 (statute of Ohio held constitutional). See Bragg v. Shain, 49 Cal. 131, 134.

In a case previously cited (Kellogg v. Howes, 81 Cal. 170, 181, 22 Pac. Rep. 509, 6 L. R. A. 588), in his concurring opinion, Mr. Justice Fox contended that the opinion of the majority of the court might be construed as allowing a stranger to go upon the land of a nonresident owner, and, through laborers and material-men, "improve"

§ 32. **The contractual relation.** The right to acquire, possess, and protect property, which includes the right to make all reasonable contracts in respect thereto, is guaranteed by the constitution, and the right of the owner is invaded if he is not at liberty to contract with others respecting the use to which he may subject his property and the manner in which he may enjoy it.[25] Yet the legislature may prescribe the form in which contracts between the owner and the contractor shall be executed and published in order that they may be valid.[26] The legislature may require the recording of the contract as a condition to its validity,[27] and may forbid any payments to the contractor, as against subclaimants, unless such contract is so recorded.[28] Such requirements are not unreasonable interferences with the right of private contract, nor restrictions upon the owner in regard to the use of his property, or in reference to the

him out of his real estate without his knowledge. He said: "The legislature has no power to authorize such a proceeding, and no precedent should be established which would sanction it. No person should be entitled to a lien or personal judgment against an owner in any case, unless he contracted the liability in person, or it be shown that he had actual notice, in some form, of the fact that his property was being improved in a manner which might create a liability or lien. A construction of the statute which would give it the effect of creating a lien, where the owner had no knowledge of the improvement, would render it unconstitutional." But in that case there was no pretense of want of knowledge by the owner.

It was intimated by the court in the opinion in department in the case of Booth v. Pendola, 88 Cal. 36, 42, 23 Pac. Rep. 200, 25 Pac. Rep. 1101, 24 Pac. Rep. 714, that the provisions of the code, as they stood in 1891, had been held constitutional by the court.

Colorado. With reference to the act of 1889, see Rice v. Carmichael, 4 Colo. App. 84, 88, 34 Pac. Rep. 1010.

[25] Snell v. Bradbury, 139 Cal. 379, 381, 73 Pac. Rep. 150; Stimson M. Co. v. Braun, 136 Cal. 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

Colorado. Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789 (Laws 1893, ch. cxvii, p. 315). See also Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419.

[26] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726; Gibbs v. Tally, 133 Cal. 373, 377, 65 Pac. Rep. 970, 60 L. R. A. 815; Stimson M. Co. v. Nolan (Cal. App.), 91 Pac. Rep. 262.

[27] Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588; Latson v. Nelson (Cal.), 11 Pac. Coast L. J. 589.

See "Void Contract," §§ 286 et seq., post, and "Notice," § 547, post.

[28] Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588.

power to make contracts concerning the same.[29] And for this reason the requirement as to filing the original contract, when the contract price exceeds one thousand dollars, is a valid exercise of the legislative power.[30]

§ 33. **Same. Valid contract. The contract being valid,** on the other hand, the legislature cannot compel the owner to pay more than he has contracted to pay,[31] except in those cases where he has been notified of the claims of subcontractors before payment to the contractor, which notice the owner has disregarded.[32] Nor can the legislature give a lien for the value of the labor or materials, irrespective of the contract price, under a valid contract,[33] nor limit the right

[29] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

[30] Stimson M. Co. v. Nolan (Cal. App.), 91 Pac. Rep. 262.

[31] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

Colorado. See Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789.

[32] Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588. See also Whittier v. Wilbur, 48 Cal. 175, 177, in which the objections raised were that the act violated the inalienable rights of, and unenumerated rights retained by, the people, and that no state shall deprive any person of property without due process of law. See Quale v. Moon, 48 Cal. 478, 481.

Washington. But, under § 1957, Code 1881, it was held that the statute giving a lien to material-men, notwithstanding payment to the original contractor, was constitutional as to future transactions: Spokane Mfg. & Lumber Co. v. McChesney, 1 Wash. 609, 21 Pac. Rep. 198.

[33] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726; but see Stimson M. Co. v. Nolan (Cal. App.), 91 Pac. Rep. 262.

Constitutional requirement applies only to those persons enumerated, namely, "mechanics, material-men, artisans, and laborers of every class." In the case last cited it was said, referring to the cases of Stimson M. Co. v. Braun, supra, and Gibbs v. Tally, 133 Cal. 373, 65 Pac. Rep. 970, 60 L. R. A. 815: "We do not accept either of these decisions as determinative of the questions here involved. Assuming, as we do, the validity of § 15, art. xx, of the constitution [**Henning's General Laws,** p. civ], which guarantees the lien, we find that this constitutional right of the laborer and material-man extends to the full value of all labor and materials bestowed or furnished; and, without legislation, such value is the measure of recovery. The legislature has seen fit, under the authority given it by the constitution, to provide, by the sections complained of, certain conditions, upon the observance of which the constitutional measure of lien and recovery is restricted to the sum specified in the contract between

of the owner and the contractor to incorporate in their contract, otherwise valid, such terms as may be mutually satisfactory to them.[34]

Under the principles above enunciated, the provision of the code [35] requiring the payments to be in money was held to be unconstitutional, as the provision is an infringement upon the right of the owner in the possession and enjoyment of his property, such method of payment not making the original contract void.[36]

§ 34. Same. Power of reputed owner. Estoppel. While the legislature may provide that the real owner may, by his contract, impose a lien upon his property,[37] a merely reputed owner of land cannot be authorized by the legislature, against the will of the real owner, to create a lien thereon, any more than he can be authorized to transfer title to the same, in the absence of estoppel, equitable or statutory;[38]

the owner and the contractor. There is no attempt to enlarge the rights of lien claimants under any circumstances, for, under the sections mentioned, where a valid contract is made, the value of the thing furnished measures the extent to which any claim can be found. The effect, therefore, of these sections is, not to impair any existing right of the owner, but in effect to confer a right not previously existing by which his liability may, under certain circumstances, be curtailed. . . . The contract by the owner is made voluntarily, and with the constitution and laws in mind, and they form part of such contract, and he must be taken to have consented to the effect of such enactments"; and the court held that the argument that the law might have the effect of increasing the necessary cost of the structure had no validity. See also Ah Louis v. Harwood, 140 Cal. 500, 505, 74 Pac. Rep. 41.

[34] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

[35] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[36] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

[37] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 116, 65 Pac. Rep. 329, 117 Cal. 212, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174.

Colorado. The original contractor being the agent of the owner, under the statute, the latter is not deprived of his property without due process of law: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786.

Washington. Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 421 (lien for street-improvements, under 2 Ballinger's Ann. Codes and Stats., § 5902).

[38] Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174, 133 Cal. 114, 116, 65 Pac. Rep. 329.

and an attempt to authorize the creation of such a lien thereon, by virtue of a contract with a merely reputed owner to make an improvement on the street adjacent thereto, or to affect the interest of the real owner therein, is unconstitutional.[39]

The principle of estoppel, equitable or statutory, as by failure to post notice of non-responsibility, when required so to do by the statute, or by holding out the reputed owner as the real owner, may, however, be invoked to prevent the real owner from questioning the acts of the reputed owner.[40]

§ 35. "Impairing obligation of contracts." The legislatures of the states may pass laws which go to the remedy on past as well as on future contracts, provided they do not impair their obligation, as prohibited by the constitution of the United States;[41] but alteration, by law, of a remedy to such an extent as to affect materially a right vested under a prior contract is unconstitutional. Thus where an indebtedness existed at the time of filing the

Under act of 1868 (Stats. 1868, p. 589, § 4, similar to § 1192, **Kerr's Cyc. Code Civ. Proc.**), it was held that the legislature has the constitutional power to enact a law to bind the interest of the owner of the land upon which a building or improvement is erected, if, upon obtaining such knowledge, he does not give the notice of non-liability prescribed by the statute: Fuquay v. Stickney, 41 Cal. 583, 587 (in this case the owner made the contract, and, of course, had knowledge); Hicks v. Murray, 43 Cal. 515, 517, 521. See also Donohoe v. Trinity Consol. G. & S. Min. Co., 113 Cal. 119, 123, 45 Pac. Rep. 259; Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83; Lowe v. Woods, 100 Cal. 409, 412.

Compare: Church v. Garrison, 75 Cal. 199, 16 Pac. Rep. 885, and Lambert v. Davis, 116 Cal. 292, 48 Pac. Rep. 123 (under the threshing-machine act (Stats. 1885, p. 109), and also Taylor v. Hill, 115 Cal. 143, 44 Pac. Rep. 336, 46 Id. 922, in reference to §§ 1206 and 1207, **Kerr's Cyc. Code Civ. Proc.**; and compare §§ 1206 and 1207, Id., as to "reputed owner."

Oregon. See Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

[39] Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 213, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174 (§ 1191, **Kerr's Cyc. Code Civ. Proc.**, held unconstitutional, so far as authorizing a merely reputed owner to create liens upon the land for street-improvements).

Idaho. And so a person unlawfully in possession cannot deprive the owner of his property: Idaho Gold M. Co. v. Winchell, 6 Idaho 729, 59 Pac. Rep. 533, 96 Am. St. Rep. 290.

[40] See notes to §§ 28 et seq., ante.

[41] Art. I, § 10, **Henning's General Laws**, p. xx.

claim, it was held that, where no lien was provided for work upon a canal under the statute of 1850, the legislature could pass an act providing for such lien after the contract was entered into. The court say: "It is difficult to perceive how an act which gives an additional remedy to the holder of a contract can be said to impair its obligation." [42] And where the materials are furnished before an amendment of the law shortening the time within which a claim must be filed, there is no impairment of the obligation of the contract, provided an adequate and valuable remedy be left; such a law is not retroactive.[43]

§ 36. Retrospective laws. The subject of retrospective laws is closely akin to that of the impairment of the obligation of contracts, already considered.[44] The California cases cannot be said to be clear on this subject. In a recent case, however, in which the question involved was an amendment to the law affecting one of the elements creating the

[42] Gordon v. South Fork C. Co., 1 McAl. 513, 10 Fed. Cas., p. 817, appealed to supreme court and affirmed on this point, but reversed as to extent of lien: South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, 18 L. ed. 894.

Colorado. See Woodbury v. Grimes, 1 Colo. 100, in which it was held that the repeal of an act allowing a lien was not unconstitutional (1864). But see Spangler v. Green, 21 Colo. 505, 42 Pac. Rep. 674, 52 Am. St. Rep. 259, in which it was held that when the rights of parties to a building contract accrued under an agreement made before the passage of amendments, whereby their contract rights were materially impaired, the law in force at the time the rights accrued, and not the amendments, must govern; Small v. Foley, 8 Colo. App. 435, 449, 47 Pac. Rep. 64; Orman v. Crystal R. R. Co., 5 Colo. App. 493, 39 Pac. Rep. 434 (time within which suit must be brought may be changed). See Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989, 990.

Nevada. See Capron v. Strout, 11 Nev. 304; Skyrme v. Occidental M. & M. Co., 8 Nev. 219; Hunter v. Savage Consol. M. Co., 4 Nev. 647; Sabin v. Connor, 21 Fed. Cas., p. 124.

Washington. See Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 39 Pac. Rep. 815.

[43] Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 84, 24 Pac. Rep. 648. See Shuffleton v. Hill, 62 Cal. 483, 6 West Coast Rep. 436 (lien on logs; syllabus misleading).

Oregon. See Willamette Falls T. & M. Co. v. Riley, 1 Oreg. 183.

As to retroactive laws, see § 36, post.

[44] § 35, ante. See, generally, notes 6 Am. Dec. 730; 10 Am. Dec. 131; 10 L. R. A. 407; 12 L. R. A. 50.

inchoate right to the lien, it was held that the rights of claimants are governed by the law in force at the time the work was done and claim of lien filed.[45]

Where a contract was made and materials were furnished while a certain lien law was in force, but the notice of lien was not filed in the recorder's office until after a subsequent lien law went into effect, the court held that the lien was not lost, but that it must be enforced in accordance with the provisions of the later act. In the second act there was a saving clause: "Nothing contained in this act shall be deemed to apply to or affect any lien heretofore acquired."[46] Until the claim was filed there was simply a right to a lien, and the lien had not yet been "acquired" (although this point was not specifically noticed in the case referred to); yet the court held[47] that "after the new statute went into effect, all subsequent acts and proceedings

[45] Higgins v. Carlotta G. M. Co., 148 Cal. 700, 703, 84 Pac. Rep. 758, 113 Am. St. Rep. 344.

Extension of the statutory agency by the amending act was the question involved in above case. As to the same point, see Jones v. Kruse, 138 Cal. 613, 614, 616, 72 Pac. Rep. 146.

Colorado. In order to determine whether or not a claimant is entitled to a lien, we must go back to the statute in force at the time the contract was entered into, and where such contract does not relate to the persons who may assert liens, or to the property against which they may be enforced under the law in force at the time of the execution of the contract, a subsequent amendment allowing a lien for work performed under a similar contract does not give a lien for labor done under such contract, as it is to be governed by the law in force at the time of its execution: Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809 (continuous contract of monthly employment).

[46] Act of April 26, 1862, § 24; Stats. 1864, p. 390.

[47] McCrea v. Craig, 23 Cal. 522, 525, where it was said that "the lien virtually commences when the labor or materials are begun to be furnished, . . . and the lien is deemed to have accrued at the time of the commencement of the work or the beginning of furnishing the materials." See Ellison v. Jackson W. Co., 12 Cal. 542, 554.

See "Priorities," §§ 486 et seq., post.

Colorado. Same principle as to statement under acts of 1883 and 1889: Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 550, 41 Pac. Rep. 844.

Where a double liability would be imposed upon the owner, see Mouat L. Co. v. Gilpin, 4 Colo. App. 534, 536, 36 Pac. Rep. 892 (1889).

The act of 1864 was repealed by the act of 1867, and all existing liens were lost, unless within the clause of the latter act saving pending proceedings: Woodbury v. Grimes, 1 Colo. 100.

relating to the lien or its enforcement were governed by, and must have been in accordance with, its provisions."

Act of 1868 was repealed by the act of 1872, and liens under the former fell: Purmort v. Tucker L. Co., 2 Colo. 470.

Under saving clause of act of 1893, where a right to a lien existed before the statute went into effect, it was not affected: Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519; Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64 (statement).

Contra: Where the right had not accrued: Bitter v. Mouat L. & I. Co., supra; Orman v. Crystal R. R. Co., 5 Colo. App. 493, 39 Pac. Rep. 434; Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989 (1893, 3 Mills's Ann. Stats., 1st ed., § 2867). See Sprague Invest. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179 (1889 and 1893).

As to right to lien, nature of improvement, and use of materials, see Michael v. Reeves, 14 Colo. App. 460, 60 Pac. Rep. 577.

One doing work as a subcontractor on a structure under a contract executed before the mechanic's-lien law of 1899 went into effect, should have perfected his lien under the law of 1893: Tabor Pierce L. Co. v. International T. Co., 19 Colo. App. 108, 75 Pac. Rep. 150; and see Spangler v. Green, 21 Colo. 505, 42 Pac. Rep. 674, 52 Am. St. Rep. 259.

Lien on mines. Working by lessees. Where the law (Laws 1893, p. 321), after allowing a lien to all persons performing labor or furnishing materials in the working of a mine, provided that the statute should not be applicable to the owners of any mine "when the same shall be worked by lessee or lessees," the amendment of April 13, 1895, materially modifying that proviso, must be held to apply only to leases made after that date, since otherwise the retroactive operation would be contrary to the express inhibition of § 11, art. ii, of the constitution of Colorado: United M. Co. v. Hatcher, 79 Fed. Rep. 517, 25 C. C. A. 46, 49 U. S. App. 139.

Oregon. Where the contractor entered into a contract while the act of 1851 was in force, and continued to work until after the act of 1854 was passed repealing the former without any saving clause, the latter act was regarded as a continuation of the former; the labor in question was regarded as an entirety, and the rights of the contractor determined in accordance with the law in force at the time the contract was made, but such rights were to be established and enforced by the law existing at the time of bringing the suit: Willamette Falls T. & M. Co. v. Riley, 1 Oreg. 183.

Where the mechanic's-lien statute of 1874 was repealed by another statute, which gave a similar lien, but provided that nothing contained therein should affect any lien theretofore acquired, and that the same should be enforced under the repealing act of 1885, and the labor and material were furnished while the act of 1874 was in force and at the time of the repeal and thereafter, and the persons furnishing the same would have had such lien, limited by the original contract price, or any instalment thereof to become due thereon according to the contract, by giving notices in writing to the employer of the nature and extent of their claims against the contractor, and such repeal and enactment of the new statute occurred before a deferred payment became due, although no notice had been given, the lien provided in the repealing act might, under its provisions, attach for the benefit of such claimants, limited by such instalment. Since the later act did not require a written notice, the lien would attach without it: Ainslie v. Kohn, 16 Oreg. 363, 19 Pac. Rep. 97.

And the same rule was applied with reference to the time of filing the claim of lien.[48] But where a lien had been

Nevada. A substantial re-enactment of prior laws, somewhat modified, repealing the same in direct terms, the intention to preserve rights acquired under the old laws and to consolidate and extend them being clear, will be considered as a continuance of such laws. The statute in existence at the time of the performance of the labor, giving a right to a lien for the same, and a right to an action to enforce it, is part of the contract, and the repeal of the statute does not affect the right to the lien or the action to enforce it: Sabin v. Connor, 21 Fed. Cas., p. 124.

Utah. Similar principle to Willamette Falls T. & M. Co. v. Riley, 1 Oreg. 183, in Garland v. Bear L. & R. W. W. Irrigation Co., 9 Utah 350, 34 Pac. Rep. 368, it being held, however, that the lien came into existence when the material was furnished (acts of 1888 and 1890); **affirmed** in Bear L. & R. Water Co. v. Garland, 164 U. S. 1, 41 L. ed. 327, 17 Sup. Ct. Rep. 7.

Washington. Where § 19, Laws 1893, p. 32 (Ballinger's Ann. Codes and Stats., § 5918), repealed all prior conflicting laws, and provided that "all rights acquired under any existing law of this state are hereby preserved, and all actions now pending shall be proceeded with under the law as its exists at the time this act shall take effect," it authorized the procedure under the former law merely for those actions begun prior to the taking effect of the act of 1893. Rights accruing before the taking effect of the act of 1893, for the enforcement of which actions were instituted subsequent thereto, were governed by the mode of procedure provided in the act of 1893, and the right to a lien when the labor had been performed was preserved by this section: Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 39 Pac. Rep. 815. See Garneau v. Port Blakeley M. Co., 8 Wash. 467, 36 Pac. Rep. 463.

"The rights of parties under mechanic's-lien laws are to be ascertained and fixed by the law in force when the contract was made; but such rights are to be established and enforced by the law existing at the bringing of the suit." "Where a right existed under the old law, — and most of the cases are with reference to questions of limitation, — the right would not be curtailed by the provisions of the new law": Hopkins v. Jamieson-Dixon Co., 11 Wash. 308, 312, 39 Pac. Rep. 815, reviewing a number of cases, and citing McCrea v. Craig, 23 Cal. 522, 525, with approval. The case urges as an objection that there would otherwise be two procedures for the enforcement of liens at the same time; "a portion of them proceeding under the old act, and a portion under the new, a condition in the practice which cannot be justified by anything but the plain provisions of the law authorizing it."

Mechanic's-lien law of 1877 was intended as a substitute for that of 1873, and, under the law of 1877, liens or rights accrued and actions or proceedings commenced under the old law were fully kept alive by the new; but the old law itself was repealed; and it was held, as to the time of filing the claim of lien, that every proceeding to enforce a right accruing under the later statute must conform, as far as practicable, to the requirements of the new law: Seattle & W. W. R. Co. v. Ah Kowe, 2 Wash. Ter. 36, 3 Pac. Rep. 188.

[48] Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 84, 24 Pac. Rep. 648 (amendment of March 15, 1887, to § 1187, **Kerr's Cyc. Code Civ. Proc.**). See Tuttle v. Block, 104 Cal. 443, 449, 38 Pac. Rep. 109.

acquired, and the statute [49] subsequently enacted provided that nothing contained in the act should be deemed to apply to or affect any lien theretofore acquired, a provision in the latter law allowing extensions of time to foreclose the lien appears to have been held to apply only to subsequent and not to existing liens.[50]

§ 37. Same. Homestead. Priorities. As the statute regarding homesteads originally stood in this state, no provision was made for a mechanic's lien thereon, and no such lien could be enforced against a homestead.[51] By the amendment to the code passed in 1887 [52] this was changed by a specific provision for a mechanic's lien on homesteads.[53] Under this amendment, materials furnished prior to the statute may become the basis of a lien under the statute; there is no constitutional bar to such a lien, as the statute does not affect the contract, but merely takes away the right of the homestead claimant to defeat a just claim against his property.[54]

Where homestead not subject to mechanic's lien, a material-man who enters into a contract to furnish materials for the improvement of property before it is impressed with the character of a homestead cannot be defeated of his right to a lien by subsequently filing a declaration of homestead covering the property on which the improvement is made or is to be made, because the lien, or the right to the lien, relates to the time of furnishing the material, and at that time the homestead did not exist.[55]

[49] Act of April 27, 1855, Stats. 1855, p. 159, § 12.

[50] See Gamble v. Voll, 15 Cal. 508, 509.

[51] **Kerr's Cyc. Civ. Code,** § 1241, and note. See Richards v. Shear, 70 Cal. 187, 11 Pac. Rep. 607.

As to homestead, see § 468, post.

[52] Act of March 9, 1887, Stats. and Amdts. 1887, p. 81.

[53] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 649, 22 Pac. Rep. 860.

[54] Davies-Henderson L. Co. v. Gottschalk, supra.

Joint action of husband and wife not necessary to create mechanic's lien on homestead: Palmer v. Lavigne, 104 Cal. 30, 34, 37 Pac. Rep. 775.

[55] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860.

Compare: Townsend v. Wild, 1 Colo. 10 (1861).

§ 38. **Repeals.** Repeals by implication are not favored, and cannot be effected by a provision which is devoid of constitutional force, and the provisions of an amended section, which are copied without change, are not to be considered as repealed and again re-enacted, but to have been continued as the law.[56] The direct repeal of an act repeals also all amendments of that act. Thus where an act gave mechanics' liens only upon buildings and wharves, and a subsequent act extended the former act so as to include in its provisions bridges, ditches, flumes, and aqueducts constructed to create hydraulic power or for mining purposes, and the former act was repealed by a third and later

See this subject further discussed under the head of "Extent of Lien," §§ 468, 493, post.

Utah. In the absence of an express contract creating a lien in favor of a contractor, a decree requiring a sale of the homestead to satisfy a judgment foreclosing a material-man's lien for materials furnished for improving the same is based only on the statute, and is an execution, within § 1, art. xxii, of the constitution, providing that the legislature shall provide for the selection of a homestead to be exempt from execution sale, and the provision of § 1156, Rev. Stats. 1889, that the homestead may be sold to satisfy judgments foreclosing mechanics' liens for work done in improving the same, is in conflict with this section of the constitution: Volker-Scowcroft L. Co. v. Vance (Utah), 88 Pac. Rep. 896.

Compare: Cal. Const. 1879, art. xvii, § 1, **Henning's General Laws,** p. cii.

As to doctrine of instantaneous seizin and priority of mechanic's lien over mortgage given, not as a part of the purchase price of the land, title to which was acquired after entering into the contract for the improvement, but to raise money with which to erect building, see note 7 Am. & Eng. Ann. Cas. 624. See also 14 L. R. A. 307 (superiority over mortgage for advances).

[56] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 117, 65 Pac. Rep. 329, as to the construction of § 1192, **Kerr's Cyc. Code Civ. Proc.,** relating to lien on lots for street-improvements, etc., held that the same was not repealed by an unconstitutional amendment.

As to repeal by implication, see **Kerr's Cyc. Code Civ. Proc.,** § 18, and note pars. 3-21.

Oregon. Repeals by implication are not favored in law, and two acts in pari materia stand together, and are given effect, if practicable and possible. Under these rules, the general mechanic's-lien law of Oregon (Laws 1885, p. 13), as applicable to railroads, was not repealed by implication by the later act, which gives a lien also to a class of creditors not included within the terms of the original act, and provides a different procedure for their enforcement (Laws 1889, p. 75). Both statutes may be sustained, as giving to the persons enumerated in the first statute a cumulative remedy as against railroads: Ban v. Columbia S. R. Co., 117 Fed. Rep. 21, 29, 54 C. C. A. 407, **reversing** s. c. 109 Fed. Rep. 499.

act, it was held that the repeal carried with it the supplementary act, which extended the provisions of the original act.[57]

§ 39. Contractor's bond. There is no constitutional policy back of the provision in the California code requiring the filing of a bond with the recorder;[58] and although the provision had been upheld as against several constitutional objections,[59] yet it was subsequently determined to be unconstitutional, both as against the owner and the contractor, as making a discrimination, and also as being an unreasonable restraint on the right to contract, founded on no natural, inherent, or constitutional distinction.[60]

§ 40. Attorneys' fees and costs. The provision in the California code concerning the allowance of attorneys' fees

[57] Ellison v. Jackson W. Co., 12 Cal. 542, 554. Without the original act there was no mode of enforcing the supplementary act. The latter was so dependent upon the former as to become utterly inoperative upon the repeal; **affirmed** in Horn v. Jones, 28 Cal. 195, 204.

As to repeal and revision generally, see **Kerr's Cyc. Code Civ. Proc.,** § 18, and note pars. 22-32.

Colorado. Where material was furnished before the act allowing a lien was passed, no lien was allowed: Townsend v. Wild, 1 Colo. 10 (1861).

Compare: Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860.

[58] **Kerr's Cyc. Code Civ. Proc.,** § 1203; see Gibbs v. Tally, 133 Cal. 373, 377, 65 Pac. Rep. 970, 60 L. R. A. 815.

[59] Upheld as containing in the title a sufficient statement of the subject of the act, and as not being a special law: Mangrum v. Truesdale, 128 Cal. 145, 60 Pac. Rep. 775; Carpenter v. Furrey, 128 Cal. 665, 668, 61 Pac. Rep. 369; Deyoe v. Superior Court, 140 Cal. 476, 489, 74 Pac. Rep. 28, 98 Am. St. Rep. 73. See Gibbs v. Tally, 133 Cal. 373, 65 Pac. Rep. 970, 60 L. R. A. 815.

Washington. As to act of 1893, ch. xxiv, p. 32, requiring bond from railroad contractor, being unconstitutional, see Armour v. Western Const. Co., 36 Wash. 529, 78 Pac. Rep. 1106; Laidlaw v. Portland V. & Y. R. Co., 42 Wash. 292, 84 Pac. Rep. 855.

[60] San Francisco L. Co. v. Bibb, 139 Cal. 192, 194, 72 Pac. Rep. 964, 139 Cal. 325, 73 Pac. Rep. 864; W. W. Montague Co. v. Furness, 145 Cal. 205, 78 Pac. Rep. 640; Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. Rep. 250, 71 Id. 701; Gibbs v. Tally, 133 Cal. 373, 65 Pac. Rep. 970, 60 L. R. A. 815; Snell v. Bradbury, 139 Cal. 379, 380, 73 Pac. Rep. 150; Hampton v. Christensen, 148 Cal. 729, 740, 84 Pac. Rep. 200. See People's L. Co. v. Gillard (Cal. App.), 90 Pac. Rep. 556, s. c. 136 Cal. 57, 68 Pac. Rep. 576; Stimson M. Co. v. Braun, 136 Cal. 125, 126, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

in suits to foreclose mechanics' liens [61] was at first upheld as against a number of constitutional objections, similar provisions having been sustained in some of the states under what may be termed the "Washington doctrine," [62] but later the provision was declared to be unconstitutional, in accordance with the Colorado doctrine, as violating the fourteenth amendment of the Federal constitution, as well as the clauses of the state constitution providing that general laws shall be uniform, prohibiting special laws, and guaranteeing the right to acquire, possess, and protect property, and as allowing fees in one kind of action and not in other kinds of actions, and as creating a distinction not founded on any constitutional or natural difference.[63]

[61] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

[62] Peckham v. Fox, 1 Cal. App. 307, 308, 82 Pac. Rep. 91 (hearing in the supreme court denied).

Idaho. Sess. Laws 1899, ch. i, p. 150, § 12, did not violate art. i, § 18, of the state constitution, prohibiting class legislation, nor the provision requiring equal justice to be afforded to all: Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 74 Pac. Rep. 958.

Montana. Comp. Stats., ch. xxv, allowing such fees, held not to violate the fourteenth amendment of the constitution of the United States: Gilchrist v. Helena H. S. & S. R. Co., 58 Fed. Rep. 708; Helena Steam Heating Co. v. Wells, 16 Mont. 65, 40 Pac. Rep. 78; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. Rep. 280 (1889).

New Mexico. Comp. Laws 1897, § 2229, providing for such attorneys' fees, held not to violate the fourteenth amendment to the Federal constitution: Genest v. Las Vegas M. Bldg. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

Oregon. Attorneys' fees, under Hill's Ann. Laws, § 3677, held to be in the nature of costs, and not obnoxious to the constitutional provision as to granting privileges to litigants not granted to others, and denying the equal protection of the laws: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

Washington. 2 Ballinger's Ann. Codes and Stats., § 5911, allowing attorneys' fees, held constitutional: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571 (a leading case); Littell v. Saulsberry, 40 Wash. 550, 82 Pac. Rep. 909; Fitch v. Applegate, 24 Wash. 25, 64 Pac. Rep. 147.

As to logger's-lien law, see Ivall v. Willis, 17 Wash. 645, 50 Pac. Rep. 467.

[63] Builders' Supply Depot v. O'Connor (Cal. Sup., Jan. 10, 1907), 88 Pac. Rep. 982, 983; Union L. Co. v. Simon (Cal. Sup.), 89 Pac. Rep. 1081, **reversing,** on this point, s. c. (Cal. App.) 89 Pac. Rep. 1077; Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983. See also Atkinson v. Woodmansee, 68 Kan. 71, 74 Pac. Rep. 640, 64 L. R. A. 325.

Colorado. Provision as to such fees (Sess. Laws 1893, ch. cxvii, p. 325, § 18, 3 Mills's Ann. Stats., 1st ed., § 2893a), held unconstitutional: Davidson v. Jennings, 20 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340 (a leading case); Antlers Park R. M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226; Campbell v. Los Angeles G. M. Co.,

The provision as to costs,[64] however, namely, the small expense of filing the claim of lien, has been sustained as constitutional.[65]

§ 41. **Jurisdiction. Special case.** The jurisdiction of the superior court to render a personal judgment, where the amount is less than three hundred dollars, upon failure to establish a lien in the equitable suit, has been upheld under the constitution,[66] although previously a contrary ruling had been made.[67]

Special case. It seems that the present mechanic's-lien law, although found among the "special proceedings,"[68] being of an equitable nature, is not a "special case," within the meaning of the constitution.[69]

28 Colo. 256, 64 Pac. Rep. 194; Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107; Burleigh Bldg. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83, 87; Los Angeles G. M. Co. v. Campbell, 13 Colo. App. 1, 7, 56 Pac. Rep. 246; Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. Rep. 350, s. c. (Sup.) 86 Pac. Rep. 1045. See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52.

Utah. Rev. Stats., § 1400, providing for such fees, held a special law, in violation of Const., art. vi, § 26, subd. 18, as a general law can be made applicable: Brubacker v. Bennett, 19 Utah 401, 57 Pac. Rep. 170.

[64] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

[65] Builders' Supply Depot v. O'Connor (Cal. Sup., Jan. 10, 1907), 88 Pac. Rep. 982, 985.

[66] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983; Becker v. Superior Court (Cal. Sup.), 90 Pac. Rep. 689, **overruling** Miller v. Carlisle, 127 Cal. 327, 59 Pac. Rep. 785.

[67] Miller v. Carlisle, 127 Cal. 327, 59 Pac. Rep. 785.

[68] **Kerr's Cyc. Code Civ. Proc.,** pt. III.

[69] Cal. Const. 1879, art. vi, § 5, **Henning's General Laws,** p. lxxxii.

Under the old constitution, and under the act of 1850, an equitable proceeding to foreclose the lien was provided, and it was held not to be a "special case": Brock v. Bruce, 5 Cal. 279; but the act of 1856, as amended in 1861, which was a peculiar proceeding, similar in its disposition of liens to proceedings on claims in insolvency matters, was held to be a "special case," and that county courts had jurisdiction of such matters: McNiel v. Borland, 23 Cal. 144, 149.

Montana. The case of Marsh v. Morgan, 18 Mont. 19, 44 Pac. Rep. 85, **criticized,** and it was held that there was nothing in the constitution of Montana changing the rule that a mechanic's-lien suit was an equity case: Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678.

CHAPTER III.

PERSONS ENTITLED. IN GENERAL.

§ 42. Constitutional and legislative classifications.
§ 43. Classification as to relation to owner or employer.
§ 44. Same. As to individuality of claimants.

§ 42. Constitutional and legislative classifications.[1] The California constitution of 1879 [2] enumerates: 1. Mechanics; 2. Material-men; 3. Artisans; and 4. Laborers of every class, as persons entitled to mechanics' liens. After the adoption of the constitution, section eleven hundred and eighty-three of the Code of Civil Procedure was amended in 1880, by which amendment another, 5. Architects, was added to the classes enumerated in the constitution. By the amendment of March 18, 1885, the following classes were added: 6. Contractors; 7. Subcontractors; 8. Machinists; 9. Builders; 10. Miners, eis nominibus; and 11. All persons and laborers of every class. The amendments of 1887, 1899, and 1903 did not alter the classes specified in section eleven hundred and eighty-three.

Section eleven hundred and eighty-three of the Code of Civil Procedure defines the classes which are entitled to liens, at least upon structures and mining claims; [3] and, as it now stands, enumerates: 1. Mechanics; 2. Material-men; 3. Contractors; 4. Subcontractors; 5. Artisans; 6. Architects; 7. Machinists; 8. Builders; 9. Miners; and 10. All persons and laborers of every class, performing labor, etc. The liens of those classes of persons enumerated in the constitution are mandatory liens directed to be provided for by

[1] **Before the new constitution** of California was adopted, § 1183 of the Code of Civil Procedure enumerated as persons entitled to liens under the circumstances therein described: 1. Persons performing labor; and 2. Persons furnishing materials. The old constitution did not provide for mechanics' liens.

See "Constitutional Aspects," ch. ii, ante.

[2] **Henning's General Laws**, ch. xx, p. civ, § 15.

[3] Jewell v. McKay, 82 Cal. 144, 150, 23 Pac. Rep. 139.

the legislature; the others are not. Persons holding such constitutional mandatory liens have, in some respects, rights superior to others not so enumerated, but, as between themselves, they stand on the same footing. This is particularly so as to the priority of their claims.[4]

Distinction between classes of lienors. The law recognizes a clear distinction between contractors, subcontractors, material-men, mechanics,[5] and laborers, and these different words designate distinct classes of persons, having different rights, remedies, and duties; but in a few of the states the statute has apparently attempted to obliterate some of these distinctions.[6] The legislature has seen fit to limit the benefit

[4] Miltimore v. Nofziger Bros. L. Co. (Cal. Sup.), 90 Pac. Rep. 114; Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262. See Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873.

See "Priorities," §§ 486 et seq., post.

The classes vary in the different jurisdictions:

Alaska. Civ. Code 1900, § 262.

Arizona. Rev. Stats. 1901, §§ 2888, 2902, 2903, 2904, 2905, 2906.

Colorado. Mills's Ann. Stats. and Codes, §§ 2867, 2870, 2870a.

Hawaii. Rev. Laws 1905, § 2173.

Montana. Code Civ. Proc., § 2130.

Nevada. Cutting's Comp. Laws, §§ 3881, 3882. History of the statute, as to persons entitled to lien, in Gould v. Wise, 18 Nev. 253, 3 Pac. Rep. 30.

New Mexico. Comp. Laws 1897, §§ 2217, 2218.

Oklahoma. 2 Wilson's Rev. and Ann. Stats., art. xxvii, ch. lxvi, § 619, as amended Sess. Laws 1905, p. 316; 2 Wilson's Rev. and Ann. Stats., § 621, as amended Sess. Laws 1905, p. 317.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5653, 5663, 5668.

Utah. Rev. Stats. 1898, §§ 1372, 1397.

Washington. Pierce's Code, § 6102.

Wyoming. Rev. Stats. 1899, §§ 2868, 2869, 2889.

[5] Hinckley v. Field's B. & C. Co., 91 Cal. 136, 139, 27 Pac. Rep. 594.

Section 1183 of Kerr's Cyc. Code Civ. Proc. affects the right of three distinct classes of persons: 1. The owner; 2. The original contractor; 3. Subcontractors, material-men, artisans, and laborers, — so classified with reference to the rights of contractor under void contract: Laidlaw v. Marye, 133 Cal. 170, 174, 65 Pac. Rep. 391.

Colorado. See Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. Rep. 844.

[6] See Malone v. Big Flat G. M. Co., 76 Cal. 578, 585, 18 Pac. Rep. 772.

These distinctions are dwelt upon in detail herein: See §§ 25 et seq., ante; and §§ 45 et seq., 66 et seq., 77 et seq., 104 et seq., post.

Montana. See dissenting opinion in Bonner v. Minnier, 13 Mont. 269, 34 Pac. Rep. 30, 40 Am. St. Rep. 441.

Utah. See Rev. Stats., § 1383.

of the lien to particular classes, and the courts are not authorized to extend it to others.[7]

§ 43. Classification as to relation to owner or employer. Each of the various classes of persons, above enumerated as entitled to a mechanic's lien, may be subdivided in two great divisions: 1. Those in privity, or those who contract directly with the owner or through his common-law agent;[8] and 2. Those who do not stand in a relation of contract or privity with the owner.[9]

Important consequences follow these distinctions; such, for instance, as whether or not the claimant is obliged to seek his remedy, either directly or indirectly, against the property, or fund in the hands of the owner due to the

[7] Williams v. Santa Clara M. Assoc., 66 Cal. 193, 199, 5 Pac. Rep. 85, 4 West Coast Rep. 616; Morse v. De Ardo, 107 Cal. 622, 626, 40 Pac. Rep. 1018. In the former case it was said: "Indeed, it would, perhaps, be difficult to say why one class of 'material-men' or laborers should have preference over another; why, for instance, the furnisher of seed, or the plowman, should not have a lien on the farm of him to whom the seed is supplied, or for whom the plowing is done." And in the concurring opinion of Mr. Justice McFarland in Giant Powder Co. v. San Diego F. Co., 88 Cal. 20, 25, 25 Pac. Rep. 976, it is said: "In the eye of justice, a merchant who deals in lumber or hardware has no more right to a lien than a merchant who deals in potatoes, or flour, or sugar; and the former has a lien only as a legislative privilege. The language should not be strained for the purpose of enlarging the privileged class." See Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 290, 65 Pac. Rep. 578; San Francisco Pav. Co. v. Fairfield, 134 Cal. 222, 224, 66 Pac. Rep. 255.

Colorado. Lindemann v. Belden Consol. M. & M. Co,, 16 Colo. App. 342, 65 Pac. Rep. 403; Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 552, 41 Pac. Rep. 844; Pitschke v. Pope, 20 Colo. App. 328, 78 Pac. Rep. 1077; Maher v. Shull, 11 Colo. App. 322, 52 Pac. Rep. 1115; Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744.

Nevada. But see Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632 (C. C., Nev.).

Oregon. See Kezartee v. Marks, 15 Oreg. 529, 534, 16 Pac. Rep. 407.

[8] **In interpreting mechanic's-lien law,** it is not to be considered as a general law relating to contracts and contractual relations, but simply as a means provided whereby a laborer, or other person provided for in the law, may declare his intention to exercise his constitutional right to a lien, and to enforce the same: Los Angeles Pressed Brick Co. v. Higgins (Cal. App., Aug. 8, 1908), 7 Cal. App. Dec. 164.

Utah. "Original Contractors": Rev. Stats., § 1383. See Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764.

[9] Cahoon v. Levy, 6 Cal. 295, 65 Am. Dec. 515, which made the same distinction as to the statute then in force. See Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860.

Kerr's Cyc. Code Civ. Proc., § 1183, and note.

contractor, and whether the lienor's rights are limited by the terms of a valid or void statutory original contract, and the like, all of which will be fully treated in their appropriate places hereafter.

§ 44. **Same. As to individuality of claimants.** While the right to a lien is, under the California statute, personal,[10] yet such right is not confined to an individual, but is also extended to partnerships [11] and to corporations.[12]

[10] See §§ 19-23, ante.

[11] Simons v. Webster, 108 Cal. 16, 40 Pac. Rep. 1056; Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 42 Pac. Rep. 154. See San Diego L. Co. v. Wooldredge, 90 Cal. 574, 27 Pac. Rep. 431.

Each partner has the right to create a lien; and where a partnership makes a contract for materials, it is immaterial to the right of the partnership to file a lien therefor, whether the contract was or was not completed prior to the dissolution of the partnership, or that one partner sold to the other partners all his interest in the firm; and the right of the partnership to claim and file a claim of lien for the materials is not destroyed by the extinguishment of one partner's general interest in the partnership, or by the substitution of a new partner in his place: Simons v. Webster, 108 Cal. 16, 19, 40 Pac. Rep. 1056. See also Dunlop v. Kennedy (Cal. Sup., Aug. 31, 1893), 34 Pac. Rep. 92.

Washington. And a person furnishing material under the name of the "Western Mill Factory" may assert a lien in his own name: Littell v. Saulsberry, 40 Wash. 550, 82 Pac. Rep. 909.

[12] See Russ L. Co. v. Garrettson, 87 Cal. 589, 590, 25 Pac. Rep. 747; Giant Powder Co. v. San Diego F. Co., 88 Cal. 20, 22, 25 Pac. Rep. 976; Kennedy-Shaw L. Co. v. Priet, 113 Cal. 291, 45 Pac. Rep. 336.

Oregon. It was held that a corporation organized to manufacture and sell lumber could not hold a lien for labor performed in the construction of a building: Dalles L. & M. Co. v. Wasco W. Mfg. Co., 3 Oreg. 527.

Utah. See Rev. Stats., § 1377.

Washington. Where a foreign corporation filed articles of incorporation, and the bond of its agent was made before suit to foreclose its lien was commenced, but after the filing of the claim of lien, it is sufficient: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 125, 32 Pac. Rep. 1073. See Dearborn F. Co. v. Augustine, 5 Wash. 67, 31 Pac. Rep. 327.

Under § 6133 of Pierce's Code, a person is entitled to a lien, though a stockholder and officer of a corporation: Cors v. Ballard I. W., 41 Wash. 390, 83 Pac. Rep. 900 (general laborer's lien on property of corporation).

Corporation is a "person" entitled, under the above statute: See note 7 Am. & Eng. Ann. Cas. 430.

Same. Foreign corporation entitled to a lien, same as a domestic corporation: See Wetzel & T. R. Co. v. Tennis Bros. Co., 145 Fed. Rep. 458, 7 Am. & Eng. Ann. Cas. 426.

See also authorities collected in note 7 Am. & Eng. Ann. Cas. 430.

Municipal corporation not entitled, unless specially authorized by statute: See note 7 Am. & Eng. Ann. Cas. 430.

CHAPTER IV.

ORIGINAL CONTRACTORS.

§ 45. Definition of "original contractor."
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§ 47. Same. Four essential factors.
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§ 63. Same. As against other persons.
§ 64. General obligations of original contractors. To person causing improvement to be made.
§ 65. Same. To other persons.

§ 45. Definition of "original contractor." The California statute providing for and regulating mechanics' liens uses the expressions "contractor" [1] and "original contractor" [2] interchangeably as synonymous. These terms assume, in this statute, a highly technical meaning. Their definitions are not free from difficulties. The decisions of the courts do not attempt to define the term "original contractor."

[1] **Kerr's Cyc. Code Civ. Proc.**, §§ 1183, 1184, 1193, 1201, and notes.
Oklahoma. See Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.
[2] **Kerr's Cyc. Code Civ. Proc.**, §§ 1187, 1194, and notes.
Colorado. "Principal contractor."
Idaho. As to one contracting directly with owner, an original contractor, see dissenting opinion Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 518.

The courts confine themselves to pointing out the consequences which flow from the status of an original contractor, rather than to laying down rules by which it may be determined whether a person is such a contractor; rather to declaring who is not an original contractor, than to defining who is such a contractor.

§ 46. **Same. One test. Intermediate liens.** One test laid down by the supreme court of California is: "If there could be intermediate lien-holders for work done or materials furnished," then the person contracting with the owner is an original contractor.[3] This seems to mean that if the person who enters into a contract with the owner can, by his contracts with others, create such a relation between himself and them that they, by virtue of the statute, may have a lien upon the property for which they have furnished materials, or upon which they have performed labor, then such person is an "original contractor"; but the competency to create "intermediate" liens is rather a result that follows from the status of "original contractor," and, at most, is only one of the essential characteristics of an "original contractor,"[4] because a subcontractor may create "intermediate" liens, as will be more fully discussed hereafter.[5]

Material-men. It is thought, in view of the constitutional provision, that a material-man who is obligated by his contract to do certain work on the premises in placing the materials in situ may enable his laborers to impose liens upon the property for the work of actually affixing the materials to the realty. In the case of Roebling's Sons Co. v. Humboldt Electric Light and Power Company,[6] among others, the persons who furnished an electric "plant" and

[3] Sparks v. Butte County G. M. Co., 55 Cal. 389, **followed** in La Grill v. Mallard, 90 Cal. 373, 376, 27 Pac. Rep. 294; Hinckley v. Field's B. & C. Co., 91 Cal. 136, 140, 27 Pac. Rep. 594; Sparks v. Butte County G. M. Co., 55 Cal. 389, 392; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758.

[4] **As to original contract,** non-statutory, see ch. xiv, post.
Same, statutory, see chs. xv et seq., post.

[5] §§ 66 et seq., post.

[6] 112 Cal. 288, 44 Pac. Rep. 568.
See §§ 66 et seq., post.

prepared the foundation for the same were held to be material-men, and not original contractors, and persons furnishing them with materials were held not entitled to a lien against the property.

Laborers placing in situ. Yet, under these circumstances, it will, in all probability, not be held that the laborers doing the actual work of preparing the foundation or installing the "plant" would not be entitled to liens upon the property for the value of their services; although it was held that the persons furnishing the materials to such material-men were not entitled to a lien on the property for the value thereof. To hold otherwise as to such laborers would be practically to obliterate the constitutional provision and a portion of section eleven hundred and eighty-three of the Code of Civil Procedure, to the effect that the wages of laborers actually engaged in the construction of an improvement upon real property shall be secured by a lien thereon.

§ 47. Same. Four essential factors. The following is submitted as tending, in a measure, to clear up this difficult subject. Under the California statute there are four essential factors necessary to establish the status of an "original contractor": 1. The person must be in privity with the owner, or person who "caused the improvement" to be made, by direct contract with him, or through his common-law agent;[7] 2. He must be competent to create "intermediate" liens; 3. Such liens must be dependent upon, or be capable of being marshaled under, some indebtedness for which he is personally liable to some person or persons; and 4. The contract must be substantially one for labor. These characteristics will be considered hereafter in detail.[8]

§ 48. Same. Two or more original contractors. The chapter in the California code relating to mechanics' liens

[7] And not by a merely statutory agent, under § 1183, **Kerr's Cyc. Code Civ. Proc.**, providing that a subcontractor, etc., in charge of the construction, etc., shall be held to be the "agent" of the owner for the purposes of the chapter.

See "Agency," §§ 572 et **seq., post.**

[8] §§ 49 et seq., **post.**

does not contemplate that there shall be no "original contractor," except for the entire work of constructing a building. For the purpose of constructing a building, the owner may enter into different original contracts for the different classes of work involved therein. If he should enter into a contract with one person for the construction of a building in all its parts, except the painting, and should afterwards enter into a contract with another person to do the painting of the building, each of these individuals would be an "original contractor," within the meaning of the statute, and it would be immaterial whether the contract with the latter for the painting was entered into prior to or subsequently to the completion of the work of erecting the building.[9]

§ 49. **First test. Privity.**[10] Generally speaking, in order to confer upon laborers, material-men, and the other persons named in the statute, a right to a lien under an original contract, it must have all the elements essential to a valid contract at the common law. Privity is one of the essential elements to a valid contract, or to rights thereunder. If there is no privity between the contractor and the owner, or person who "caused" the improvement, it seems clear that such contractor is not an "original contractor."[11] It is evident that the "owner" cannot contract with himself and thereby make himself an "original contractor"; and it follows from this that the "owner," or the one holding the legal title to the real property, cannot be an "original contractor," even though he may agree with the equitable owner to erect a building upon the premises for the latter.

§ 50. **Same. Holder of legal title.** A person holding the legal title to land, who enters into a contract with a

[9] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 232, 39 Pac. Rep. 758. See La Grill v. Mallard, 90 Cal. 373, 375, 27 Pac. Rep. 294; Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610, 611.

See § 16, ante.

Oregon. See Beach v. Stamper, 44 Oreg. 4, 74 Pac. Rep. 208, 102 Am. St. Rep. 597.

[10] **Utah.** See Rev. Stats., § 1383.

[11] See Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449.

corporation to construct a factory thereon, for a consideration fixed upon, and agrees to convey the building after its completion, together with the land upon which it stands, to the company, is not an "original contractor," within the meaning of the mechanic's-lien law,[12] but is the owner of the building.[13]

§ 51. **Same. Tenant.** Where a tenant, with the consent of his landlord, makes a contract with a third person, whereby the latter is to raise a house upon the land, the tenant is not an "original contractor," within the meaning of the statute, but is the person who "caused" the building to be raised, and the third person is the "original contractor," or person who, in the sense of the statute, "contracted" to raise it.[14]

§ 52. **Same. Void contract.** And again, where the "original contract" is void for want of record,[15] although the statute provides that under such circumstances the labor done and materials furnished shall be deemed to have been done and furnished at the personal instance of the owner, the subcontractor, who, of course, is not in actual privity with the owner, does not thereby become the "original contractor," [16] although such subcontractor is competent

[12] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[13] Hinckley v. Field's B. & C. Co., 91 Cal. 136, 139, 27 Pac. Rep. 594.

Colorado. See Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 314 (1883), 51 Pac. Rep. 519.

Idaho. See dissenting opinion, Ailshie, J., Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 518.

[14] Johnson v. Dewey, 36 Cal. 623, 624 (1862).

Arizona. See Walter C. Hadley Co. v. Cummings, 7 Ariz. 258, 64 Pac. Rep. 443.

Montana. Block v. Murray, 12 Mont. 545, 31 Pac. Rep. 550 (contract of purchase requiring work on mine to be done).

[15] See "Original Contract," §§ 286 et seq., post.

[16] Coss v. MacDonough, 111 Cal. 662, 667, 44 Pac. Rep. 325; Davis v. MacDonough, 109 Cal. 547, 549, 42 Pac. Rep. 450. But see Kellogg v. Howes, 81 Cal. 170, 180, 22 Pac. Rep. 509 (see 11 Pac. Coast L. J. 589, 6 L. R. A. 588), where it was somewhat carelessly stated that the claimants under a void contract became, for the purpose of their liens, "original contractors"; but by this the court evidently intended it to be understood that they were to be deemed to have contracted directly with the owner.

to create " intermediate " lien-holders; for where the " original contract " is void, the " original contractor " ceases to be such, within the meaning of the statute,[17] at least for certain purposes.

§ 53. **Same. Implied original contract.** This original contract may be either express or implied. Although there may be no statutory " original contract," with its peculiar incidents, there may still be an " original contractor "; e. g., the original contractor may enter into an implied contract with the owner, as where he undertakes to paint a building, or decorate rooms therein, furnishing the labor and material therefor, and no express agreement is made as to his compensation for such labor and materials.[18]

§ 54. **Second test. Intermediate lien-holders.** The " original contractor " must be competent to create " intermediate " liens. Although a person may be in privity with the owner, yet he may not be competent to create " intermediate " liens. Thus a mere laborer who gives his personal services on the property, at the request of the owner, under contract with him, and who is not in charge thereof, and who is without authority of the owner to incur indebtedness on his behalf, is not an " original contractor." [19]

§ 55. **Same. Agency.** The original contractor, ordinarily, is at arm's-length from the owner, but sometimes a so-called contractor enters into a contract to erect a structure upon a tract of land for a percentage of the cost of construction,

[17] Pierce v. Birkholm, 115 Cal. 657, 662, 47 Pac. Rep. 681; Davis v. MacDonough, 109 Cal. 547, 549, 42 Pac. Rep. 450.

[18] See La Grill v. Mallard, 90 Cal. 373, 375, 27 Pac. Rep. 294; Bennett v. Davis, 113 Cal. 337, 340, 54 Am. St. Rep. 354, 45 Pac. Rep. 684. See, as bearing somewhat on this point, Baird v. Peall, 92 Cal. 235, 237, 28 Pac. Rep. 285; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758.

See §§ 194, 202, 211, 214, 259 et seq., post.

[19] See Davis v. MacDonough, 109 Cal. 547, 549, 42 Pac. Rep. 450; Sparks v. Butte County G. M. Co., 55 Cal. 389, 392. See also Weithoff v. Murray, 76 Cal. 508, 510, 18 Pac. Rep. 435.

See §§ 104 et seq., post.

See " Laborer," §§ 109 et seq., post.

Material-man is not an " original contractor ": See § 46, ante.

rendering himself, in effect, the common-law agent of the owner, instead of the statutory agent. In such event, claimants dealing with him cannot be said to have "intermediate liens," but must be held to have contracted directly with the owner.[20] This subject will be further considered under the head of "Agency."[21]

§ 56. **Same. Direct contract with owner.** A person who contracts directly with the owner may not be competent to create such "intermediate" liens, although he may be personally indebted to others in the performance of his contract. Thus a mere material-man cannot create such liens in behalf of persons engaged in the mere preparation of the materials which he furnishes,[22] or in behalf of persons from whom he obtained them; and such persons have no lien upon the property.[23]

§ 57. **Same. Material-man.** A mere material-man is not an "original contractor," not only for the reasons set forth in the sections immediately preceding, namely, on account of his inability to create intermediate lien-holders, but also particularly because his contract is not a contract for labor, under the test hereafter to be more fully discussed in this chapter.[24] It is sometimes difficult to determine whether a person is an "original contractor" or a "material-man."[25]

§ 58. **Third test. Personal liability.** The "intermediate" liens must be dependent upon, or be capable of being

[20] **Oregon.** See Cline v. Shell, 43 Oreg. 372, 73 Pac. Rep. 12.

[21] See "Agency," §§ 572 et seq., post.

[22] See "Definition," § 45, ante. The text refers to labor other than that of placing the material in situ.

[23] Sparks v. Butte County G. M. Co., 55 Cal. 389, 391; Wilson v. Hind, 113 Cal. 357, 45 Pac. Rep. 695.

See "Material-men," §§ 77, 81 et seq., post.

[24] Schwartz v. Knight, 74 Cal. 432, 433, 16 Pac. Rep. 235; California P. W. v. Blue Tent Const. H. G. M., 22 Pac. Rep. 391.

See §§ 59 et seq., post.

Idaho. The owner's material-man was held to be an original contractor for the purpose of filing claim of lien: Colorado I. W. v. Riekenberg, 4 Idaho 262, 38 Pac. Rep. 651.

Utah. But see Rev. Stats., § 1383.

[25] See "Material-men," §§ 77, 81, post.

marshaled under, some indebtedness for which the "original contractor" is personally liable to some person or persons. A person may be "competent" to create such "intermediate liens," and be in direct privity with the owner, but if he is not personally liable for the indebtedness, he still may not be an "original contractor." Thus the architect of the work upon the premises might be competent to create liens thereon and be in direct contractual relations with the owner, but, acting as the mere agent of the owner, he would not be personally liable for the materials furnished or labor performed; and it seems clear that a mere architect is not an original contractor.[26]

A builder, or foreman in charge of the construction, likewise, might be hired by the owner by the day for that purpose, and be competent to create liens upon the premises by hiring men and purchasing materials as the agent of the owner, and thereby not be personally responsible for the same, and thus not be an original contractor.[27]

§ 59. **Fourth test. Labor contract.**[28] The contract must be essentially one for "construction, alteration, or repair," or for work or labor, with or without materials, and not "for materials." Stated in this form, the principle seems plain; but it is often difficult to determine when a contract is for construction or materials, depending upon the peculiar facts of each case. This subject is more fully discussed under the head, "Distinction. Material-man. Original Contractor, and Subcontractor."[29]

[26] See **Kerr's Cyc. Code Civ. Proc.,** § 1183. See §§ 46, 54, ante.

Washington. See Cadwell v. Brackett, 2 Wash. 321, 26 Pac. Rep. 219.

[27] **In Davies-Henderson L. Co. v. Gottschalk,** 81 Cal. 641, 647, 22 Pac. Rep. 860, it was contended that there must be a personal liability on the part of some one to support a lien. The court said: "This may be so, though we do not so hold." There was, however, a personal liability in that case.

[28] **Oregon.** See Tatum v. Cherry, 12 Oreg. 135, 6 Pac. Rep. 715 (1874).

Distinction between sales of personalty and agreements for work and labor, see 1 L. R. A. 507, 14 L. R. A. 230.

[29] See § 77, post.

Washington. See Pacific R. M. Co. v. Hamilton, 61 Fed. Rep. 476 (C. C.); Pacific R. M. Co. v. James Street Const. Co., 68 Fed. Rep. 966, 971, 16 C. C. A. 68, 29 U. S. App. 698.

Several "original" contractors. It is a common practice for a party desirous of erecting a building to let different contracts to various parties for the building of certain portions of it; and it is not necessary that the contract be for the building of the entire structure, in order that each may be impressed with the status of original contractor, and men employed by them may be entitled to file a claim of lien.[30]

§ 60. Distinction between "original contractor" and "material-man." It is clear that a person who furnishes materials to the owner, without performing any labor upon the building or land, or in the placing of the materials in situ, is not an original contractor.[31] Generally speaking, the person who contracts with the owner for certain work to be done on a building is an "original contractor." Thus a painter who contracts to paint a building is an original contractor, even though he furnishes the paint for such work.[32] A difficulty arises, however, in distinguishing

[30] La Grill v. Mallard, 90 Cal. 373, 375, 27 Pac. Rep. 294; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 232, 39 Pac. Rep. 758.

See §§ 45 et seq., ante. But see Sparks v. Butte County G. M. Co., 55 Cal. 389, 392.

In Maione v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772, a laborer had a contract to furnish certain other laborers, but the wages of these men were to be paid to him individually, and he employed the men. The contract was, therefore, substantially to do labor; but if he had simply acted the part of an employment-office, and the owner was directly liable to the laborers, he would not have been an original contractor.

Washington. See Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 317, 39 Pac. Rep 815: "This court has held that one cannot enforce a lien for the labor of hired men, but we think that the testimony in this case shows, in the case of Hopkins, that it was substantially for furnishing and for his own labor."

[31] Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 83, 24 Pac. Rep. 648. See Barrows v. Knight, 55 Cal. 155, 158.

Idaho. Contra, California cases considered: Colorado I. W. v. Riekenberg, 4 Idaho 262, 38 Pac. Rep. 651.

Montana. See Eccleston v. Hetting, 17 Mont. 88, 42 Pac. Rep. 105, where the court construed the contract as requiring the placing of the materials in situ.

Oregon. Same rule as text: Inman v. Henderson, 29 Oreg. 116, 45 Pac. Rep. 300.

Washington. Pacific Rolling-Mill Co. v. Hamilton, 61 Fed. Rep. 476 (Cir. Ct.), **affirmed** in Pacific Rolling-Mill Co. v. James Street Const. Co., 68 Fed. Rep. 966, 16 C. C. A. 68, 29 U. S. App. 698.

[32] Baird v. Peail, 92 Cal. 235, 237, 28 Pac. Rep. 285.

between an "original contractor," who may not only perform labor, but who may also furnish materials therefor, and a "material-man" who is required by his contract not only to furnish materials but also the labor of placing them in situ upon the premises.[33]

Illustrations. In Bennett v. Davis,[34] it was said by Mr. Justice Temple: "The question is somewhat similar to that which sometimes arises under the statute of frauds — the precise issue being whether the contract is one of sale or for the manufacture of goods. Numerous decisions have been rendered in such cases, and, so far as I know, no rule universally applicable has been formulated. The cases seem generally to turn upon the relative value of the work and goods, or how far the article was modified by the work. . . . The main consideration, after all, is, whether the labor bestowed upon the article was merely trifling in comparison to the price. . . . Hinckley v. Field's Biscuit and Cracker Co.,[35] was a case where plaintiff contracted to furnish 'and to deliver and put in place, upon foundations prepared by said Arthur Field in said structure, building, and factory, a steam plant, consisting of boilers, engine, heater, feed-pipes, etc.' Plaintiff was held to be a material-man only, and it was said: 'The work done by them on the premises of defendants, in placing them in position, was only the completion of their contract to deliver such finished machinery, and did not convert them into contractors for the erection of the factory, or any part of it, within the true intent of the statute.' In La Grill v. Mallard,[36] it was held that a person who contracts to paper and decorate several rooms in a building and furnishes the material is an original contractor. I see little difference in the cases, save in the relative amounts of material and labor. In the last case the contract was to decorate as well as to hang paper, and further, the defendant promised to pay for the labor in decorat-

[33] See "Definition," §§ 45 et seq., ante.
[34] 113 Cal. 337, 338, 45 Pac. Rep. 684, 54 Am. St. Rep. 354.
[35] 91 Cal. 136, 27 Pac. Rep. 594.
[36] 90 Cal. 373, 27 Pac. Rep. 294.

ing the building. The material used in decorating a room may be very trifling in comparison to the labor. The main point discussed in La Grill v. Mallard was, whether an implied contract to pay was such a contract as is specified in the mechanic's-lien law. The labor required to place the engines and machinery in proper position, in the case of Hinckley v. Field's Biscuit and Cracker Co., was evidently much greater than the labor performed in La Grill v. Mallard, but, relatively to the material furnished, it was much less. In the one case the material was not only the principal thing, but compared to it the work was trifling. In the other the work was the important matter." [37]

A contract to convert an ice-works into a new system of ice-making, and to furnish certain material therefor, consisting of a number of tanks, and the proper circulating-pumps and connecting-pipes and connecting-shafts and pulleys, the owner to furnish the foundations, water-wheel and its settings, tail-race, and pulleys for transmitting power, and all freights and cartages, was held to be for material.[38] It was said by the court: "In Hinckley v. Field's Biscuit and

[37] In Hinckley v. Field's B. & C. Co., 91 Cal. 136, 140, 27 Pac. Rep. 594, it was held that the contract was essentially one to furnish materials for a factory, and not a building contract. This principle was followed with approval in Roebling's Sons Co. v. Humboldt E. L. & P. Co., 112 Cal. 288, 291, 44 Pac. Rep. 568. See Donahue v. Cromartie, 21 Cal. 81, 86. In Bennett v. Davis, 113 Cal. 337, 45 Pac. Rep. 684, 54 Am. St. Rep. 354, the earlier case of Roebling's Sons Co. v. Humboldt E. L. & P. Co., 112 Cal. 288, 44 Pac. Rep. 568, was not noticed. The last-mentioned case seems to have also followed the rule laid down in Hinckley v. Field's B. & C. Co., supra, that where the contract is essentially one to furnish materials, it will not be held the contract of an original contractor. See also Baird v. Peall, 92 Cal. 235, 237, 28 Pac. Rep. 285 (contract to paint a building and furnish materials: held, original contractor); and see "Nature of Labor," §§ 130 et seq., post. See also Flynn v. Dougherty, 91 Cal. 669, 27 Pac. Rep. 1080.

[38] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637.

Nevada. Where claimant contracted with the owner of a mine to furnish mining machinery, appliances, and materials, and install the same in a mill to be erected at the mine by the owner, under § 3885, Cutting's Comp. Laws, claimant was an original contractor, and not a material-man: Salt Lake H. Co. v. Chainman M. & E. Co., 128 Fed. Rep. 509, s. c. 137 Fed. Rep. 632.

Utah. See Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986, in which the contract of the owner's material-man was held to be a building contract, to which the doctrine of caveat emptor did not apply.

Cracker Co.,[39] . . . it was held that the word 'contractor,' as used in that section,[40] does not apply to one who contracts to furnish material only. . . . The case went off upon a demurrer to the complaint, in which it appeared that the claimant contracted to construct at its own works, and deliver and put in place, on foundations to be prepared by the owner, a complete steam plant, machinery, and pump, the several parts of which were enumerated in the complaint. . . . This entire steam plant was to be put up on foundations prepared by the owner, and also connections for steam, water, and exhaust, made ready for use. That was certainly as much of a structure as that contracted for in this case. The only apparent difference pointed out by defendants is, that in this case the tanks were in fact built on the premises, and the woodwork in the brine-tank was sublet. There was nothing in the contract, however, as to where they should be made, and all might have been made at the shops, and brought to the premises ready to be set up. And when put up they only constituted a machine to be used in the building where they were to be placed. In the case above cited it was held that the work done in placing the machinery in position, ready to be used, was but the completion of the contract to deliver. A similar ruling was made in Roebling's Sons Co. v. Humboldt Electric Light and Power Company.[41] There the contract was to set up in defendant's building a complete electrical plant, consisting of dynamos, converters, switchboards, lamps, etc., with necessary wiring and connections. In that case, it might have been argued plausibly that the plant was made on the premises. Much of the machinery and materials, such as the wire, for instance, was as characterless as the Oregon ship-timber, the bolts and steel plates used by the defendants in the construction of the tanks. Yet, it was held there, too, that putting up the machinery was but a part of the agreement to deliver material. Questions of this character are often very difficult,

[39] 91 Cal. 136, 27 Pac. Rep. 594.
[40] Kerr's Cyc. Code Civ. Proc., § 1183.
[41] 112 Cal. 289, 44 Pac. Rep. 568.

— though, as pointed out in Bennett v. Davis,[42] they are not altogether new, — being quite similar to a much-vexed question which sometimes arose under the statute of frauds, — the question as to whether a certain agreement was to manufacture or sell goods. I think this case is clearly within the rule laid down in Hinckley v. Field's Biscuit and Cracker Co., and also in Roebling's Sons Co. v. Humboldt Electric Light and Power Company." [43]

§ 61. General rights of original contractors. As against person who "caused" the improvement to be made.[44] Except as modified by statute, the rights of the original contractor, as against his employer, or the person who "caused the improvement to be made," are the same as at common law. Thus the contractor has the right of personal action against such person.[45]

Upon breach of contract by the employer, preventing the contractor from completing performance of the contract, if it would have cost the contractor the full unpaid balance to complete the contract, it would not appear that he was

[42] 113 Cal. 337, 45 Pac. Rep. 684.

[43] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637.

[44] See "Obligation of Owner," §§ 523 et seq., post; "Notice," §§ 547 et seq., post; "Release," §§ 634 et seq., post; and "Agency," §§ 572 et seq., post.

Colorado. Contractor on public improvement: See Denver v. Hindry (Colo.), 90 Pac. Rep. 1028, 1029.

[45] **Kerr's Cyc. Code Civ. Proc.,** § 1197, and note; Perry v. Quackenbush, 105 Cal. 299, 308, 38 Pac. Rep. 740.

See "Relation of Lien to the Debt," § 20, ante; "Cumulative Remedies," §§ 638 et seq., post; "Decree," ch. xl, post.

See also authorities in note 3 Am. & Eng. Ann. Cas. 1100.

His rights upon performance are elsewhere discussed: See "Performance," §§ 334 et seq., 354, post; "Obligations of Owner," §§ 523 et seq., post; also Marchant v. Hayes, 117 Cal. 669, 671, 49 Pac. Rep. 840.

Colorado. The contractor has also an action for damages for delay and breach of contract, and he is not required to assert this right in any particular time, nor is he estopped from saying that the contract has not been performed according to its terms, because he has not made objection to the breach: Florence O. & R. Co. v. Reeves, 13 Colo. App. 95, 56 Pac. Rep. 674.

Washington. Where the contract provides that the owner may perform work that the contractor has neglected to perform, the latter may foreclose a lien for the contract price, the cost of the work done by the owner being deducted: Sweatt v. Hunt, 42 Wash. 96, 84 Pac. Rep. 1 (there was no abandonment of the contract).

damaged by being prevented from completing it, unless by the loss of the profit he would have made upon his own labor.[46]

Under a valid contract, "the contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished"; [47] and if nothing is due to him after such deductions, he cannot recover costs, attorneys' fees, or interest.[48]

Under void contract. If the original contract is void for want of proper record, the original contractor, under the California statute, is not entitled to a lien for the value of the work done thereunder.[49]

[46] Gamache v. South School Dist. of San Joaquin, 133 Cal. 145, 148, 65 Pac. Rep. 301.

Prevention: Cox v. Western Pac. R. Co., 47 Cal. 87, 89. See also "Abandonment," §§ 358 et seq., post.

[47] **Kerr's Cyc. Code Civ. Proc.,** § 1193; Stimson v. Dunham, C. & H. Co., 146 Cal. 281, 79 Pac. Rep. 968.

Alaska. Civ. Code 1900, § 272.

New Mexico. Comp. Laws 1897, § 2227.

Utah. Rev. Stats., § 1373; Morrison, Merrill & Co. v. Willard, 17 Utah 306, 53 Pac. Rep. 832.

Washington. Pierce's Code, § 6111. But a void judgment on a subclaimant's claim should not be deducted from the contractor's claim, under Ballinger's Ann. Codes and Stats., § 5909: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719.

The original contractor is entitled to a lien, although he performs no actual labor or furnishes no material for the building, but only oversaw the construction; and being primarily liable to his materialman, he is entitled to claim a lien for the material, the same as though it had been furnished by himself: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719.

[48] Stimson v. Dunham, C. & H. Co., 146 Cal. 281, 79 Pac. Rep. 968.

Washington. Where the owners, at the contractor's request, promised, when nothing was due the contractor, but failed, to pay the contractor's subclaimants, the costs of subclaimants' actions should not be deducted from the contractor's claim: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719.

[49] McClain v. Hutton, 131 Cal. 132, 142, 61 Pac. Rep. 273, s. c. 63 Pac. Rep. 182, 622; Morris v. Wilson, 97 Cal. 644; 32 Pac. Rep. 801; Spinney v. Griffith, 98 Cal. 149, 154, 32 Pac. Rep. 974; Marchant v. Hayes, 117 Cal. 669, 671, 49 Pac. Rep. 840.

See "Void Contract," §§ 315 et seq., post; "Cumulative Remedies," §§ 638 et seq., post; "Rights of Owner," §§ 510 et seq., post; and "Obligations of Owner," §§ 523 et seq., post.

Washington. Where, by a provision of the contract, the contractor was obliged, upon receiving written authority from the architect,

Voluntary payments made by the owner, which he had no right to make, for instance, a payment in excess of his legal liability, cannot be deducted from the contractor's claim.[50]

§ 62. **Same. As against other persons in privity with him.** If the subcontractor fails to complete his subcontract, the original contractor may complete the same and deduct the expense from the subcontract price;[51] and, with the consent of the subcontractor, the original contractor has the right to pay the material-men who furnished materials to the subcontractor, and to direct the application of the payment to that purpose.[52] His lien is paid out of the proceeds of the property after the liens of all his subclaimants have been paid.[53]

§ 63. **Same. As against other persons.** The original contractor's lien is preferred to any other lien, mortgage, or other encumbrance which may have attached subsequently to the time when the building, improvement, or structure may have been commenced or work done; also, to any of which he had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced or work done;[54] and his claim will be paid in preference to the demands of the general creditors of the contractor, which are unsecured, upon the balance of the fund after payment of other lien-holders.[55]

approved by the owner, to perform any work demanded by the owner and architect in the alteration, modification, or addition, without the approval of the owner, the architect's authority would not justify the contractor in deviating from the plans and specifications: De Mattos v. Jordan, 15 Wash. 378, 385, 46 Pac. Rep. 402.

[50] Brill v. De Turk, 130 Cal. 241, 244, 62 Pac. Rep. 462.

[51] See Pacific R. M. Co. v. English, 118 Cal. 123, 130, 50 Pac. Rep. 383; Pohlman v. Wilcox, 146 Cal. 440, 80 Pac. Rep. 625.

See "Cumulative Remedies," §§ 638 et seq., post.

[52] Petersen v. Shain (Cal., Aug. 16, 1893), 33 Pac. Rep. 1086.

[53] **Kerr's Cyc. Code Civ. Proc.,** § 1194. See "Priorities," §§ 486 et seq., post.

[54] **Kerr's Cyc. Code Civ. Proc.,** § 1186. See §§ 49 et seq., ante.

[55] Kennedy & S. L. Co. v. Priet, 115 Cal. 98, 99, 46 Pac. Rep. 903; Kennedy & S. L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

See "General Creditors," §§ 601 et seq., post.

§ 64. **General obligations of original contractors.**[56] **To person causing improvement to be made.** Correlative with his right to recover under a valid contract is the duty of the original contractor to carry out the contract in accordance with its terms,[57] unless such performance is excused by the acts of the owner;[58] and where the owner takes possession and ousts the contractor from the building, without cause, and refuses to permit him to complete the building according to the contract, and appropriates to his own use the material on hand and provided to be used for the construction, the contractor may consider such contract as rescinded.[59] But

[56] See "Correlative Rights of Owner," §§ 510 et seq., post (126); "Subcontractor," §§ 70 et seq., post; "Material-man," § 101, post; "Performance," §§ 334 et seq., post; "Abandonment," § 358, post.

[57] See "Cumulative Remedies," §§ 638 et seq., post; also authorities in note 3 Am. & Eng. Ann. Cas. 1100; and "Performance," §§ 334 et seq., post.

Oregon. A building contractor who is required by the contract to keep the brickwork straight and plumb is not liable for defects in that respect, caused by building an extra story, under a modification of the contract, without materially strengthening the foundation: Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437.

The measure of damages for failure to do the work or furnish the materials contracted for is the difference between the value of the class of work or materials contracted for and that furnished: Chamberlain v. Hibbard, supra.

Utah. Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986.

Washington. Ekstrand v. Barth, 41 Wash. 321, 83 Pac. Rep. 305.

One who agrees to build a building abandoned by the original contractor has a reasonable time to complete it, where no date is specified in his agreement, although the original contract required it to be completed at a specified time: Brodek v. Farnum, 11 Wash. 565, 40 Pac. Rep. 189.

Where payment is made on building contract subsequent to expiration of time agreed upon for completion, the owner is not entitled to damages for loss of rents prior to the date of such abandonment by him; no objection having been made to the rate of progression of the building, such payment was held a waiver: Brodek v. Farnum, 11 Wash. 565, 40 Pac. Rep. 189.

[58] Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487. See also "Certificates," §§ 238 et seq., post.

Washington. Or his agent: Olson v. Snake River Val. R. Co., 22 Wash. 139, 60 Pac. Rep. 156.

Where, by the terms of a building contract, the owner is required to provide the foundation of the building, which he undertakes to do, he cannot recover damages from the contractor for making the ground-floor above the street grade, when such defect is the result of the foundation being too high: Brodek v. Farnum, 11 Wash. 565, 40 Pac. Rep. 189.

[59] Adams v. Burbank, 103 Cal. 646, 649, 37 Pac. Rep. 640.

where the contractor substantially fails to perform his contract, he cannot recover for the reasonable value of his work and materials.[60]

It is also the contractor's duty to pay off all the indebtedness which he has incurred for labor or materials in performing the contract, and the interest, costs, and counsel fees recovered against the owner or the property in foreclosure suits;[61] and in all cases where a lien is filed under the chapter on mechanics' liens[62] for work done or materials furnished to him, to defend any action brought thereon, at his own expense, whether the contract is valid or void.[63] He must also pay the owner the amount of any judgment and costs, in actions by subclaimants, above the amount due to him from the owner, and if the owner has settled with the contractor in full, the contractor must repay the amount so paid in excess of the contract price, and for which the contractor was originally the party liable.[64]

[60] Laidlaw v. Marye, 133 Cal. 170, 65 Pac. Rep. 391.

[61] **Kerr's Cyc. Code Civ. Proc.,** § 1193; Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394; Covell v. Washburn, 91 Cal. 560, 563, 27 Pac. Rep. 859; Whittier v. Wilbur, 48 Cal. 175, 178.

Arizona. Rev. Stats. 1901, § 2901.

Nevada. Cutting's Comp. Laws 1900, § 3890.

New Mexico. Comp. Laws 1897, § 2227.

Washington. Pierce's Code, § 6111.

[62] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1203a.

[63] **Kerr's Cyc. Code Civ. Proc.,** § 1193; Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394; Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449. See Covell v. Washburn, 91 Cal. 560, 27 Pac. Rep. 859.

Alaska. Civ. Code 1900, § 272; act of Congress June 6, 1900, ch. xxviii.

Arizona. Rev. Stats. 1901, § 2901.

Nevada. Cutting's Comp. Laws 1900, § 3890.

New Mexico. Comp. Laws 1897, § 2227.

Washington. Pierce's Code, § 6111.

Wyoming. Rev. Stats. 1899, § 2906.

[64] **Kerr's Cyc. Code Civ. Proc.,** § 1193, and note.

In Boas v. Maloney, 138 Cal. 105, 107, 70 Pac. Rep. 1004, it was said (obiter) that the owner could hold the contractor liable for the liens filed against the owner's property in excess of the contract price, when the contract is void.

Hawaii. He is not liable for the wages of an inspector voluntarily employed by the owner for his own benefit, even after the time when the contract should have been completed: American-Hawaiian Eng. & Cons. Co. v. Territory, 17 Hawn. 195.

§ 65. **Same. To other persons.** The liability of the original contractor to the person who performed labor for or furnished materials to subcontractors, under subcontracts, seems to depend on the general principles of contract, and, broadly speaking, follows the analogies of the general law suggested by the liability of the owner to the subcontractor.[65] The creditors of the original contractor are entitled, under the general principles of contract, to a money judgment against him, whether they have a lien on the building or not.[66] He is under the primary obligation to pay his own subclaimants,[67] but, in the absence of privity, he is not personally liable to claimants under such subclaimants.[68]

Duty to file contract for record. It is the duty of the contractor, as well as of the owner, to properly file the contract, containing the essentials required by the statute, or a sufficient memorandum thereof, in the recorder's office of the county, or city and county, where the property is situated, before the work is commenced, when the agreed contract price exceeds one thousand dollars.[69]

Cannot waive rights when. It is not competent for the contractor, by any term of his contract, or otherwise, to waive, affect, or impair the liens of other persons, whether with or without notice, except by their written consent.[70]

[65] But see Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 643, 22 Pac. Rep. 860.

[66] Kennedy-Shaw L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336; McMenomy v. White, 115 Cal. 339, 343, 47 Pac. Rep. 109.

See "Cumulative Remedies," §§ 638 et seq., post; "Decree," ch. xl, post.

[67] Mannix v. Tryon (Cal. Sup.), Sept. 19, 1907.

[68] Kruse v. Wilson (Cal. App.), 84 Pac. Rep. 442.

[69] **Kerr's Cyc. Code Civ. Proc.,** § 1183; Morris v. Wilson, 97 Cal. 644, 645, 32 Pac. Rep. 801; Marchant v. Hayes, 117 Cal. 669, 49 Pac. Rep. 840.

[70] **Kerr's Cyc. Code Civ. Proc.,** § 1201. See Shaver v. Murdock, 36 Cal. 293, 298 (1862); Whittier v. Wilbur, 48 Cal. 175, 178 (1868).

Hawaii. See Allen v. Redward, 10 Hawn, 151, 157.

CHAPTER V.

SUBCONTRACTORS.

§ 66. Definition of "subcontractor."
§ 67. Different degrees of subcontractors.
§ 68. Distinction. Subcontractor and material-man.
§ 69. Same. Subcontractor and employees of material-man.
§ 70. General rights of subcontractors. Constitution.
§ 71. Same. Valid contract.
§ 72. Same. Void contract.
§ 73. Same. Personal rights.
§ 74. Same. Amount of claim.
§ 75. Same. Priorities.
§ 76. General obligations of subcontractors.

§ 66. Definition of "subcontractor." Independently of a statutory definition, a subcontractor may be defined to be a person who, under the original contractor, or any other subcontractor, performs the whole or a part of the work which such original contractor has undertaken to perform, with or without furnishing materials therefor, which contract, if entered into with the party who caused the improvement to be made, would constitute the subcontractor an original contractor.[1] As thus defined, in the absence of statutory limitations there seems to be no legal limit, in

[1] See definition of "Original Contractor," §§ 45-60, ante.

Distinction must be made between subcontractor and assignee of original contractor, who, by novation, steps into the shoes of the original contractor: See "Novation," § 333, post, and Downing v. Graves, 55 Cal. 544, 548.

Colorado. Schradsky v. Dunklee, 9 Colo. App. 394, 397, 48 Pac. Rep. 666; Denver H. Co. v. Croke, 4 Colo. App. 530, 36 Pac. Rep. 624. The statute includes "material-man" within meaning of "subcontractor."

Oklahoma. But see Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

Oregon. A subcontractor is one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted to perform it, there being no privity between the owner and subcontractor: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708; rehearing denied, 75 Pac. Rep. 710.

Utah. All but original contractors are subcontractors: Rev. Stats., § 1383.

As to subcontractor's lien, see Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764 (1888).

Washington. See Pacific R. M. Co. v. Hamilton, 61 Fed. Rep. 476.

California, to the degree of removal of the subcontractor from the person who "caused the improvement to be made"; for each subcontractor may subcontract with others, and thus create rights in them subordinate to his own.[2]

§ 67. **Different degrees of subcontractors.** In this work, the person who enters into a subcontract with the original contractor will be designated as a subcontractor in the first degree; the person who enters into a subcontract with such subcontractor will be denominated a subcontractor in the second degree; and so on.[3]

Void contract. A subcontractor does not contract directly with the owner, and even if the original contract is void, it does not convert a subcontractor in the first degree into an original contractor.[4]

§ 68. **Distinction. Subcontractor and material-man.** Subcontractors must be carefully distinguished from material-men, as the distinction is of great importance relative to the rights of persons dealing with them, and the extent and

[2] **Colorado.** Contra: Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. Rep. 844.

Utah. See Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764 (1888).

Washington. Owner as subcontractor: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

[3] **Colorado.** See Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. Rep. 844.

Montana. Subcontractor of subcontractor is entitled to a lien: Eccleston v. Hetting, 17 Mont. 88, 42 Pac. Rep. 105; Duignan v. Montana Club, 16 Mont. 189, 40 Pac. Rep. 294 (1887), holding that a subcontractor in any degree has a lien. See Merrigan v. English, 9 Mont. 113, 22 Pac. Rep. 454, 5 L. R. A. 837.

Oklahoma. Lien allowed where it appeared that claimant was the original contractor's subcontractor: Ball v. Houston, 11 Okla. 235, 66 Pac. Rep. 358, **distinguishing** Darlington-Miller L. Co. v. Lobsitz, 4 Okla. 355, 46 Pac. Rep. 481.

[4] Coss v. MacDonough, 111 Cal. 662, 663, 667, 44 Pac. Rep. 325; Davis v. MacDonough, 109 Cal. 547, 549, 42 Pac. Rep. 450.

See "Contractor," §§ 45-65, ante; "Void Contracts," §§ 315 et seq., post; "Nature of Work," § 130, post.

Privity of contract between subcontractor and owner is wanting: Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449.

See **Kerr's Cyc. Code Civ. Proc.,** § 1183, and note pars. 122-126.

New Mexico. This court, however, uses the following language: "The statute expressly makes the defendant (owner) liable for a debt he never contracted. He is in privity of contract, by force of the statute, with every laborer who works upon his building": Hobbs v. Spiegelberg, 3 N. M. 322, 5 Pac. Rep. 529.

priority of their liens; and the same general principles that apply in the determination of the distinction between original contractors and material-men would seem to be equally applicable here. Thus one agreeing to furnish the original contractor all the millwork needed to construct a building, consisting of manufactured material, to be delivered by him at the building, is a material-man only, and not a subcontractor.[5]

§ 69. Same. Subcontractor and employees of material-man. The person who is employed by a material-man in the preparation of the materials which he furnishes, or the party from whom he obtains them, is not a subcontractor, within the meaning of the law,[6] notwithstanding the apparently broad provision of the code,[7] that "all persons . . . furnishing material to be used in the construction, alteration, . . . of a building . . . shall have a lien . . . for the value of such . . . material furnished."

§ 70. General rights of subcontractors.[8] Constitution. The lien of a subcontractor,[9] like that of the original contractor, is not expressly, nor in terms, provided for in the

[5] Wilson v. Hind, 113 Cal. 357, 359, 45 Pac. Rep. 695.

See "Distinction," § 60, ante.

In the case of Petersen v. Shain (Cal.), 33 Pac. Rep. 1086, the person who furnished material to a subcontractor is rather loosely called a "subcontractor under the subcontractor," although elsewhere in the opinion he is properly designated as a "material-man."

Colorado. See note, § 66, ante.

Hawaii. See Hackfeld v. Hilo R. Co., 14 Hawn. 448, 452.

Montana. See Eccleston v. Hetting, 17 Mont. 88, 42 Pac. Rep. 105.

Oklahoma. But see Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

[6] Sparks v. Butte County G. M. Co., 55 Cal. 389, 391 (dictum). **Approved** in Roebling's Sons Co. v. Humboldt E. L. & P. Co., 112 Cal. 288, 292, 44 Pac. Rep. 568, and Inman v. Henderson, 29 Oreg. 116, 120, 45 Pac. Rep. 300.

See "Material-men," §§ 77 et seq., post.

[7] See **Kerr's Cyc. Code Civ. Proc.**, § 1183, and note.

[8] **Lien of subcontractor:** See note 7 L. R. A. 711.

Colorado. Subcontractors and material-men have no interest in a fund provided by the contractor for the purpose of protecting the owner against liens which may result from his failure to make payments: Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. Rep. 844.

[9] See § 28, ante.

constitution of California; his rights, except as changed by statute, are as at the general law.[10]

§ 71. Same. Valid contract. Where the original contract is valid, the rights of a subcontractor, as to the extent of his lien, are limited and measured by the terms of that contract;[11] but where the contract between the original contractor and his subcontractor does not incorporate the terms of the original contract, the subcontractor, not being a party to the original contract, is not, in the absence of fraud on his part, bound by its terms as to the manner of performing the work, or the character of the materials to be used;[12] and where there is no warranty in the subcontract as to the work, the subcontractor, complying with the terms of his contract as to the quality of the materials and its use in a workman-like manner, is entitled to recover, notwithstanding the usual result of the use of the materials specified and their application is not obtained; and there is no implied warranty under sections seventeen hundred and sixty-nine and seventeen hundred and seventy of the Civil Code,[13] which do not apply where an article is supplied

[10] **Oklahoma.** A subcontractor in the first degree may recover from the original contractor, when he is prevented from performing by the original contractor, and he is not liable on a bond given to the original contractor: Brock v. Williams, 16 Okl. 124, 82 Pac. Rep. 922.

Oregon. Where a contractor makes no application upon payments to a subcontractor, although it is impossible to show how much has been paid on each of two buildings on the contracts for which the subcontractor has equitably applied the payments, as he has a right to do, the lien of the subcontractor is not invalid: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708.

[11] Dingley v. Green, 54 Cal. 333, 335.

See "Valid Contracts," § 315, post; "Obligations of Owner," §§ 523 et seq., § 559, post; "Rights upon Abandonment by Original Contractor," §§ 358 et seq., post; "Obligations of Owner," §§ 523 et seq., post; "Lien as Limited by Contract," §§ 315 et seq., § 452, post.

Colorado. As to cutting off rights of subcontractor by original contract, see Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

Hawaii. The subcontractor or material-man is not merely subrogated to the rights of the original contractor: Pacific H. Co. v. Lincoln, 12 Hawn. 358, 361. See Allen v. Redward, 10 Hawn. 151.

Utah. Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779; Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1009. See Rev. Stats., § 1373.

[12] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983; Howe v. Schmidt (Cal.), 90 Pac. Rep. 1056.

[13] See **Kerr's Cyc. Civ. Code,** §§ 1769, 1770, and notes.

under a contract requiring that it be made according to a certain plan or certain specifications.[14]

§ 72. **Same. Void contract.** Where the statutory original contract is void, or where, being valid, it does not conform substantially to the provisions of section eleven hundred and eighty-four, as to payments, the subcontractor is deemed, under the statute, to have contracted with the owner, and may enforce his lien for the value of the work or material, although he cannot recover against the owner personally, there being no privity between them.[15]

§ 73. **Same. Personal rights.** The right of personal action against the contractor, or individual liable at common law, is, however, preserved to the subcontractor when he is in privity with such contractor;[16] otherwise not.[17] The

[14] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983.

[15] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1184, and notes; Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588. See "Extent of Lien," §§ 438 et seq., post; "Cumulative Remedies," §§ 638 et seq., post; "Obligations of Owner," §§ 523 et seq., post; "Statutory Original Contract," §§ 214, 259 et seq., post; "Payments," §§ 269 et seq., § 311, post.

As to impairment of subcontractors' liens, see **Kerr's Cyc. Code Civ. Proc.,** § 1184, and note; "Alteration of Contract," §§ 326 et seq., post; "Walver," §§ 627 et seq., post; "Answer," §§ 738 et seq., post.

Time of filing claim: See **Kerr's Cyc. Code Civ. Proc.,** § 1187, note.

As to right to intercept moneys in hands of employer, see **Kerr's Cyc. Code Civ. Proc.,** § 1184, note; and "Notice," §§ 547 et seq., post.

Colorado. The provision requlring a record of the original contract under Laws 1893, ch. cxvii, p. 315, relates only to the statutory contract, and those materially different are not binding on subcontractors, nor affect their rights, independently of notice or knowledge by them of the terms of such contracts: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786.

[16] **Kerr's Cyc. Code Civ. Proc.,** § 1197, and note. See "Cumulative Remedies," §§ 638 et seq., post.

Action on bond, as to, see **Kerr's Cyc. Code Civ. Proc.,** § 1203, and note; "Bond," §§ 281 et seq., post.

In case of a public building, excavating, or other mechanical work, under the act of March 27, 1897, if the contractor does not pay the subcontractor withln thirty days from the completlon of such work, the subcontractor may file a verified statement with the commissioners, managers, or other officers, as mentioned in the act (§ 2), in the manner therein specified, and within ninety days thereafter he may commence a suit upon the bond filed by the contractor, under the provisions of the act (Stats. 1897, p. 201, **Heuning's General Laws,** p. 1104). See "Obligations of Original Contractors," §§ 64, 65, ante.

[17] See Kruse v. Wilson (Cal. App.), 84 Pac. Rep. 442.

Oregon. See Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708, 710.

primary obligation to pay his subcontractor is on the original contractor, and in default of such payment the subcontractor has a lien on the owner's property to secure his claim, against which it may be enforced.[18] Subcontractors, however, have no right of personal action against the owner, in the absence of privity.[19] If the contractor's subcontractor, by his dealings with his own subcontractors, has given them a right against him for a greater sum than he can enforce against the property, the loss must be borne by himself, when he cannot recover from the original contractor.[20]

§ 74. **Same. Amount of claim.** It is proper for a contractor to include in the claim of lien the value of work done by subclaimants under subcontractors, but such subclaimants are not precluded from filing a claim of lien in their own behalf by the contractor's failure to include such work, since they cannot know whether the claim will be prosecuted to judgment, the decree of the court, however, determining the amount which each should receive.[21]

§ 75. **Same. Priorities.** As respects priority, the lien of the subcontractor has preference over that of the original contractor, but is subordinate to the constitutional mandatory liens.[22]

§ 76. **General obligations of subcontractors.** The general principles applying to and governing ordinary contracts,

[18] Mannix v. Tryon (Cal. Sup.), 91 Pac. Rep. 983.

[19] Builders' Supply Depot v. O'Connor (Cal.), 88 Pac. Rep. 982. Or in the absence of the statutory garnishment.

Montana. Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054, 1055.

Oklahoma. An agreement by a subcontractor not to file a lien is sufficient consideration for the owner's promise to pay the claim: Harness v. McKee-Brown L. Co. (Okl.), 89 Pac. Rep. 1020.

[20] Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312.

[21] Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312.

Oregon. See Smith v. Wilcox, 44 Oreg. 323, 75 Pac. Rep. 710, s. c. 74 Pac. Rep. 708.

[22] **Kerr's Cyc. Code Civ. Proc.,** § 1194, and note.

See "Priorities, Constitutional Provisions," §§ 28, 37, ante; "Rights of Contractors," § 62, ante.

and determining their validity or invalidity, are applicable to and govern subcontracts under which a mechanic's lien is claimed, except in so far as those principles are modified by the statute giving the right to the lien. It is thought that the contract of a subcontractor is not required to be in writing, and that he is not required to file it, although the contract price exceeds one thousand dollars.

Bound by contract. Subcontractors are bound by the terms of their contracts,[23] and upon failure to comply therewith no recovery can be had, under the general principles of law.[24]

The subcontractor in every degree is personally liable to his own material-man,[25] as well as to his own immediate subcontractors.[26] Under a void statutory original contract, the negligence of the original contractor in carrying out the work does not affect the rights of the subcontractor, as he is not responsible for such negligence.[27]

[23] See Griffith v. Happersberger, 86 Cal. 605, 612, 25 Pac. Rep. 137, 487; Dore v. Sellers, 27 Cal. 588, 594.

See "Lien as Limited by Contract," §§ 452 et seq., post.

As to right of subcontractors, other than in the first degree, or subcontractors' material-men or laborers, see "Liability of Owner," § 523, post.

[24] Pohlman v. Wilcox, 146 Cal. 440, 442, 80 Pac. Rep. 625.

[25] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860.

[26] See Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312.

[27] Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

CHAPTER VI.

MATERIAL-MEN.

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§ 100. Same. Lien allowed.
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§ 102. General obligations of material-men.
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§ 77. Distinction. Material-man, original contractor, and subcontractor. It is important to determine whether a person furnishing materials is a material-man, original contractor, or subcontractor. A material-man must be carefully distinguished from an original contractor, not only for the purpose of ascertaining whether the statutory for-

malities are necessary for the contract, but also to determine the time within which the lien must be filed. A material-man is to be distinguished from both original contractors and subcontractors, for the purpose of determining the relative rank of liens and the rights of persons entering into contractual relations with the individual in question.

Designation of material-men herein. In this work the one furnishing material to the owner, or person who "caused" the improvement to be made, will be designated as the "owner's material-man"; the one who supplied the original contractor, as the "contractor's material-man"; and the one supplying the subcontractor, as the "subcontractor's material-man."

§ 78. Definition of "material-man." A material-man may be defined to be one who furnishes (1) to the owner (a) directly, or (b) through his agent, either statutory or actual, or (2) to the original contractor, or (3) to a subcontractor, merely materials to be used, and which are actually used, in the work upon or in the objects mentioned in section eleven hundred and eighty-three.[1]

§ 79. Who are not material-men. In applying one of the tests to distinguish a contractor, heretofore discussed, namely, the capacity to create "intermediate" lien-holders, it was observed that the employees of a "material-man" (except, perhaps, those placing the material in situ) have no lien.[2] And a person who sells material to a material-man, who contracts either with the owner,[3] or with the contractor,[4] is not a "material-man," within the meaning of

[1] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[2] See §§ 46, 54, 60, 69, ante; Adams v. Burbank, 103 Cal. 646, 651, 37 Pac. Rep. 640 (hauling brick). See Hinckley v. Field's B. & C. Co., 91 Cal. 136, 140, 27 Pac. Rep. 594.

[3] Roebling's Sons Co. v. Humboldt E. L. & P. Co., 112 Cal. 288, 292, 44 Pac. Rep. 568. See Sparks v. Butte County G. M. Co., 55 Cal. 389, 391.

Washington. Pacific Rolling Mill Co. v. Hamilton, 61 Fed. Rep. 496 (Cir. Ct.), **affirmed** in Pacific Rolling Mill Co. v. James Street Cons. Co., 68 Fed. Rep. 966, 16 C. C. A. 68, 28 U. S. App. 698 (under 1 Hill's Code, § 1663).

[4] Wilson v. Hind, 113 Cal. 357, 359, 45 Pac. Rep. 695.

Oregon. Fisher v. Tomlinson, 40 Oreg. 111, 66 Pac. Rep. 696.

the statute, and has no lien therefor, as the statute makes no provision for such lien.

The distinction between a material-man and an original contractor has been already pointed out, and it is not necessary to repeat here what was said elsewhere.[5] A person furnishing material only is not an "original contractor," within the meaning of the mechanic's-lien law, but is a "material-man." [6]

§ 80. Same. Placing materials in situ. If, in addition to furnishing materials, the material-man furnishes or performs labor in placing the materials in situ, he may or may not be a material-man, according to circumstances; the rule being that if the contract is essentially one to furnish materials, and not to build, and the labor is trifling in comparison with the value of the materials, the contract is one for materials merely, and the person furnishing such materials is a "material-man." [7]

Steam plant. Thus persons manufacturing at their shops a steam plant, consisting of boiler, engine, pipes, and necessary attachments, and to deliver it and put it in place in the building for a gross price, are material-men, and not contractors, the contract being essentially one for furnishing material for a factory, and not a building contract.[8]

[5] See § 60, ante.

[6] Sparks v. Butte County G. M. Co., 55 Cal. 389, 391; Schwartz v. Knight, 74 Cal. 432, 433, 16 Pac. Rep. 235; California P. W. v. Blue Tent Consol. G. M. Co. (Cal.), 22 Pac. Rep. 391; Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 83, 24 Pac. Rep. 648; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 378, 51 Pac. Rep. 555.

See §§ 60, 68, ante.

Idaho. Contra: Colorado Iron Works v. Riekenberg, 4 Idaho 262, 38 Pac. Rep. 651.

Oregon. Same rule as text: Inman v. Henderson, 29 Oreg. 116, 45 Pac. Rep. 300.

[7] See §§ 59, 60, ante.

Nevada. Contractor to furnish mining machinery, appliances, and materials, and install the same in a mill to be erected at defendant's mine, by defendant, with no other contractor, is an original contractor, and not a material-man, under Cutting's Comp. Laws, § 3885: Salt Lake H. Co. v. Chainman M. & E. Co., 128 Fed. Rep. 509, 137 Id. 632 (distinguishing California cases).

[8] Hinckley v. Field's B. & C. Co., 91 Cal. 136, 140, 27 Pac. Rep. 594; Donahue v. Cromartie, 21 Cal. 81, 86; Lead & O. Co. v. New Albany W. W., 62 Ind. 71.

Electric plant. Likewise a contract for the furnishing of an electric plant, consisting of electric apparatus, and machinery necessary to be used in the construction of an electric-light works, by the terms of which the party furnishing the plant was to put in the foundation upon which to set the dynamos, and to furnish the skilled labor necessary for that purpose, and also to set up and connect the machinery and install the incandescent lamps, the title to the plant being reserved to the furnisher of the plant until payment made therefor, constitutes the furnisher a "material-man," and not a "contractor," the contract being also essentially one for the furnishing of materials.[9]

Ice plant. And likewise where a party contracted to take down and remove to his shop an old ice-machine and set up a new ice plant, and, among other things, to furnish certain tanks according to specifications, with the circulating-pumps and connecting-pipes, counter-shafts and pulleys, the owner, however, providing the foundation, water-wheels and settings thereof, the tail-race, and the ropes and pulleys for the transmission of power, the freights and cartages, it was held to be a contract to deliver machinery or materials, and that of a "material-man" only.[10]

Tiling and mantels. And, again, where the parties contracted with the owner of a building in process of erection to put in wooden mantels and the tiling-mantels, the tiling of which was to be placed in the building by permanently attaching it to the brickwork surrounding the mantel-pieces, the labor of putting in the mantel being small as compared with the value of the mantels, the persons furnishing the same are likewise "material-men," and not "original contractors."[11]

New machinery contracted to be furnished owner, party material-man: Bryson v. McCone, 121 Cal. 153, 156, 157, 53 Pac. Rep. 637; Hamilton v. Delhi M. Co., 118 Cal. 148, 153, 50 Pac. Rep. 378; Conefield v. Polk, 17 Ind. App. 429, 436, 46 N. E. Rep. 932.

[9] Roebling's Sons Co. v. Humboldt E. L. & P. Co., 112 Cal. 288, 291, 44 Pac. Rep. 568. See Bryson v. McCone, 121 Cal. 153, 156, 157, 53 Pac. Rep. 637.

[10] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637.

[11] Bennett v. Davis, 113 Cal. 337, 340, 45 Pac. Rep. 684, 54 Am. St. Rep. 354.

§ 81. Distinction between material-man and subcontractor. This subject has been already somewhat considered.[12] The distinction heretofore drawn between original contractors and material-men [13] seems to be pertinent in this connection. One who has a contract with the original contractor to furnish all the millwork required for the erection of a building, to be delivered at the building, is a material-man only, and not a subcontractor.[14]

§ 82. Circumstances under which lien for materials is given.[15] The contract.[16] Use of materials. It is not sufficient that the material is used in the building or other improvement, but by the terms of the contract it must be expressly furnished to be used in it,[17] and not sold, in general terms,

[12] § 68, ante.

[13] § 60, ante.

Hawaii. The statute makes no distinction between a subcontractor and a material-man, or as to whether the latter dealt directly with an owner, or with the original contractor, or with any subcontractor: Hackfeld v. Hilo R. Co., 14 Hawn. 448, 452.

[14] Wilson v. Hind, 113 Cal. 357, 359, 45 Pac. Rep. 695.

Montana. Under statute (1887), material-men contracting with original contractor were "subcontractors": See Duignan v. Montana Club, 16 Mont. 189, 40 Pac. Rep. 294.

Utah. Rev. Stats., § 1383, seems to make same provision as Montana.

[15] See, generally, note 78 Am. Dec. 268.

[16] **Oklahoma.** No provision is made for a lien for the contractor's material-man: Darlington L. Co. v. Lobsitz, 4 Okl. 355, 46 Pac. Rep. 481.

[17] Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. Rep. 1008; Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, 32, 74 Pac. Rep. 357; Weatherly v. Van Wyck, 128 Cal. 329, 60 Pac. Rep. 846; Ah Louis v. Harwood, 140 Cal. 500, 503, 74 Pac. Rep. 41; Bottomly v. Rector etc. Grace Church, 2 Cal. 90, 92; Houghton v. Blake, 5 Cal. 240, 241; Holmes v. Richet, 56 Cal. 307, 310, 38 Am. Rep. 54; Cohn v. Wright, 89 Cal. 86, 88, 26 Pac. Rep. 643; Roebling's Sons Co. v. Bear Valley Irr. Co., 99 Cal. 488, 490, 34 Pac. Rep. 80; Neihaus v. Morgan (Cal.), 45 Pac. Rep. 255.

See §§ 87 et seq., post.

As to passing of title of material, see Roebling's Sons Co. v. Humboldt Electric L. & P. Co., 112 Cal. 288, 290, 44 Pac. Rep. 568; Hamilton v. Delhi M. Co., 118 Cal. 148, 153, 50 Pac. Rep. 378 (no lien was allowed in either of these cases).

As to definition of word "furnished," see Bennett v. Beadle, 142 Cal. 239, 243, 75 Pac. Rep. 843.

Colorado. Tabor-Pierce L. Co. v. International T. Co., 19 Colo. App. 108, 75 Pac. Rep. 150; but, under Laws 1893, ch. cvii, p. 315, it was not necessary that the materials should be actually so used.

Idaho. Colorado I. W. v. Riekenberg, 4 Idaho 705, 43 Pac. Rep. 681, 682.

to be used for some unknown purpose. The material-man cannot follow his material and fix a lien for its contract price on the premises, wherever it may happen to be used.[18]

Contract out of state, for materials to be furnished for a building or improvement in the state, is to be interpreted, and is governed in its enforcement, by the laws of the state in which the contract is to be executed, and a mechanic's lien may be acquired thereunder.[19]

Montana. Missoula Mercantile Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594.

Oklahoma. Ryndak v. Seaweil, 13 Okl. 737, 76 Pac. Rep. 170. See Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303, 305.

Oregon. Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192; Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 274, 76 Am. St. Rep. 454.

Washington. Seattle L. Co. v. Sweeney (Wash.), 85 Pac. Rep. 677; Knudson-Jacob Co. v. Brandt (Wash.), 87 Pac. Rep. 43; Potvin v. Denny Hotel Co., 37 Wash. 323, 79 Pac. Rep. 940.

Materials are required to be furnished for the particular building, "and if not furnished directly to the owner, they clearly must be furnished to the contractor, as such, in that particular case, and not simply to a person generally, without any reference to the particular contract under which he is erecting the building. . . . In the case of Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. Rep. 923, we held that a lien could not be maintained upon any particular building by a person who furnished brick for a firm of contractors for use by them indiscriminately in the construction of certain buildings, for the erection of which they had contracts": Whittier v. Puget Sound L. T. & B. Co., 4 Wash. 666, 30 Pac. Rep. 1094, 31 Am. St. Rep. 944.

[18] Ah Louis v. Harwood, 140 Cal. 500, 503, 74 Pac. Rep. 41. See Bennett v. Beadle, 142 Cal. 239, 75 Pac. Rep. 843; Ripley v. Cochiti G. M. Co. (N. M.), 76 Pac. Rep. 255.

Hawaii. There need not be a contract relation between the material-man and the owner of the structure, for the lien to attach: Hackfeld v. Hilo R. Co., 14 Hawn. 448.

Oklahoma. Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

[19] **New Mexico.** Materials sold and delivered outside of the state, to be used in a particular building in the state, may form the basis of a lien under the laws of the state where the property is situated: Genest v. Las Vegas Masonic B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743; Ripley v. Cochiti G. M. Co. (N. M.), 76 Pac. Rep. 285.

See, on this subject, among other authorities, the following:

Georgia. Thurman v. Kyle, 71 Ga. 628.

Illinois. Gaty v. Casey, 15 Ill. 189.

Kansas. United States Inv. Co. v. Phelps and Bigelow W. Co., 54 Kan. 144, 14 Pac. Rep. 982.

Minnesota. Atkins v. Little, 17 Minn. 342 (Gil. 320).

Nebraska. Great Western Mfg. Co. v. Hunter, 15 Neb. 32, 16 N. W. Rep. 759; Badger L. Co. v. Mayes, 38 Neb. 822, 57 N. W. Rep. 519.

New York. Birmingham I. F. v. Glenn Cove S. Mfg. Co., 78 N. Y. 30; Campbell v. Coon, 149 N. Y. 556, 38 L. R. A. 410, 44 N. E. Rep. 300, **reversing** s. c. 8 Misc. Rep. 234, 28 N. Y. Supp. 561.

§ 83. **Same. Contract for sale, or for labor.** On the subject of contracts for sale of materials, and contracts for labor, within the statute of frauds, which bears a close relation to the subject under discussion, there is much conflict of decisions; but the weight of authority in this country supports the proposition that where the seller is to furnish materials and fashion them according to specifications furnished by the purchaser, or according to some model selected, and when, without the special contract entered into by the parties, the thing furnished would never have been put in the particular shape or condition in which it was furnished, then the contract is essentially one for labor, and is not within the statute of frauds.[20]

§ 84. **Same. Formalities. Recording contract.** The contract of the material-man is not void for want of record, nor is it otherwise subject to any particular formalities, so far as the mechanic's-lien law is concerned, even where the contract price is more than one thousand dollars.[21]

§ 85. **Same. As affected by original contract.** Knowledge by the material-man, at the time of entering into the contract, that the material does not conform to the terms of the original contract of the original contractor and the

Ohio. Bender v. Stettenius, 19 Wkly. L. Bul. 163, 10 Ohio Dec. 186.

Texas. Fagan v. Boyle I. M. Co., 65 Tex. 324.

Wisconsin. Mallory v. La Crosse Abattoir Co., 80 Wis. 170, 49 N. W. Rep. 1071.

[20] Flynn v. Dougherty, 91 Cal. 669, 671, 27 Pac. Rep. 1080, 14 L. R. A. 230.

Compare also Mannix v. Tryon (Cal. Sup., Sept. 9, 1907), 91 Pac. Rep. 983, and Bancroft v. San Francisco Tool Co., 120 Cal. 228, 52 Pac. Rep. 496.

Utah. A contract of a material-man to furnish finishing materials according to the plans and specifications, requiring all material to be thoroughly kiln-dried, hand-smoothed and scraped, is in the nature of a building contract, obligating the material-man to furnish and deliver the materials according to such specifications, and the doctrine of caveat emptor does not apply: Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986.

[21] Hinckley v. Field's B. & C. Co., 91 Cal. 136, 140, 27 Pac. Rep. 594.

See "Definition of 'Original Contract,'" § 211, post; "Statutory Original Contract," § 214, post.

owner, does not affect the material-man's lien, in the absence of conspiracy or fraud.[22]

§ 86. Same. Other general essentials. A lien for materials is not given in all cases where materials are, under the terms of the contract, furnished for use or are actually used in the work. 1. The nature of the materials; 2. The manner of their use; 3. The character of the work being done on the property for which they are furnished; and 4. The character of the property, — these are all matters to be considered in determining whether a lien has been conferred. These subjects will be considered separately below.

§ 87. Same. Nature and manner of use of materials.[23] The California constitution of 1879 provides that material-men shall have a lien upon the property "upon" which they have "furnished" materials, for the value of such materials "furnished";[24] and the Code of Civil Procedure[25] provides

[22] Howe v. Schmidt (Cal. Sup., June 27, 1907), 90 Pac. Rep. 1056. See § 103, post.

If materials were of such character as might ordinarily be used in such a building, though not of such quality as required by the contract, seller is entitled to his lien, if he had no knowledge of their unfitness: Odd Fellows' Hall v. Masser, 24 Pa. St. (12 Harris) 507, 64 Am. Dec. 675.

Materials not fit for the purpose, lien denied by some of the cases: See Boynton Furnace Co. v. Gilbert, 87 Iowa 15, 53 N. W. Rep. 1085; Harlan v. Rand, 27 Pa. St. (3 Casey) 511.

[23] Howe v. Schmidt (Cal. Sup., June 27, 1907), 90 Pac. Rep. 1056. See § 103, post.

Generally, see note 64 Am. Dec. 678, as to materials furnished to be used, but not in fact used.

Utah. Boilers, castings, and materials for carrying on mill, etc.: Rev. Stats., § 1397.

Washington. As to the ownership of the materials furnished, it was held that building-stone taken from the public land of the United States, being the property of the person who quarries it, may form the basis of a lien: Johnston v. Harrington, 5 Wash. 73, 31 Pac. Rep. 316.

Wyoming. Materials for timbering shafts, etc.: Rev. Stats. 1899, § 2869.

[24] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws,** p. civ. See Bennett v. Beadle, 142 Cal. 239, 242, 75 Pac. Rep. 843.

Montana. See McEwen v. Montana Pulp & P. Co. (Mont.), 90 Pac. Rep. 359.

[25] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

that a person "furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part," of the objects mentioned in the section, shall have a lien for the value of such materials. It has been uniformly held, both before and since the adoption of the present constitution, that the materials must not only be furnished to be used, but they must actually have been used, in the "construction, alteration, addition to, or repair" of the building or other improvement, to entitle the material-man to a lien.[26]

[26] Patent Brick Co. v. Moore, 75 Cal. 205, 211, 16 Pac. Rep. 890; Silvester v. Coe Quartz M. Co., 80 Cal. 510, 513, 22 Pac. Rep. 217; Bewick v. Muir, 83 Cal. 368, 373, 23 Pac. Rep. 389, 390; Schallert-Ganahl L. Co. v. Neale, 90 Cal. 213, 215, 27 Pac. Rep. 192. See Hamilton v. Delhi M. Co., 118 Cal. 148, 153, 50 Pac. Rep. 378; Barrows v. Knight, 55 Cal. 155, 159; California Powder Works v. Blue Tent Consol. M. Co. (Cal.), 22 Pac. Rep. 391; Tibbetts v. Moore, 23 Cal. 208, 214 (1856); Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610; Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. Rep. 1008; Roebling's Sons Co. v. Bear Valley Irr. Co., 99 Cal. 488, 34 Pac. Rep. 80; Weatherly v. Van Wyck, 128 Cal. 329, 60 Pac. Rep. 846; Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, 32, 74 Pac. Rep. 357; Ah Louis v. Harwood, 140 Cal. 500, 503, 74 Pac. Rep. 41. See Mandary v. Smartt, 1 Cal. App. 498, 500, 82 Pac. Rep. 561; Bennett v. Beadle, 142 Cal. 239, 242, 75 Pac. Rep. 843; Parke and Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 493, 82 Pac. Rep. 51.

For definition of "furnished," see Tibbetts v. Moore, 23 Cal. 208, 214; Bennett v. Beadle, 142 Cal. 239, 242, 75 Pac. Rep. 843.

Colorado. Antlers Park Regent M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226; Michael v. Reeves, 14 Colo. App. 460, 60 Pac. Rep. 577.

Under Laws 1893, ch. cxvii, p. 315, § 1, the materials need not be used in the structure.

Under act of 1889, material was not required to be actually used: Small v. Foley, 8 Colo. App. 445, 47 Pac. Rep. 64. But see Sayre-Newton L. Co. v. Union Bank of Denver, 6 Colo. App. 541, 41 Pac. Rep. 844.

Hawaii. Allen v. Redward, 10 Hawn. 151, 158.

Idaho. Colorado Iron Works v. Riekenberg, 4 Idaho 705, 43 Pac. Rep. 681.

Montana. See Duignan v. Montana Club, 16 Mont. 189, 40 Pac. Rep. 294; Missoula Mercantile Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

Oklahoma. Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170; Harness v. McKee-Brown L. Co. (Okl.), 89 Pac. Rep. 1020, 1021. See Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303, 305.

Oregon. Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192. See Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54.

Material left over. No lien can be had for the material remaining after the completion of the building and not used: Fitch v. Howitt, supra.

Use in room sublet. It is no defense, as to the owner and lessee, that a portion of the material was used in a room sublet by the lessee to a third person: Nottingham v. McKendrick, 38 Oreg. 495, 63 Pac. Rep. 822.

§ 88. **Same. Definition of "furnished."** A material-man may be properly said to have "furnished" the materials when he has delivered them, or has them ready for delivery, at the place where he has agreed to deliver them under the contract.[27]

§ 89. **Same. Materials, how "used."** While the rule that the materials must be used in the building or other improvement is well established, its application is sometimes difficult. The materials must be used not merely in the process of construction, but "in the structure"; that is to say, they must be used as the materials of which it is constructed.[28] The materials may, in a degree, be "used" or be instrumental in forwarding the work, for the furnishing materials for which, in general, a lien has been given, and may, perhaps, be indispensable for that purpose, and yet no lien may have been given therefor under the statute.[29] Thus picks and shovels used in the construction of a rail-

Utah. Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781.

Washington. W. P. Fuller & Co. v. Ryan (Wash.), 87 Pac. Rep. 485. But see Potvin v. Denny Hotel Co., 37 Wash. 323, 79 Pac. Rep. 940.

Portion only used, lien for whole when. In Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 34 Pac. Rep. 774, it was held that where materials have been specially designed for a building, and furnished to the contractor therefor, a lien may be claimed for the whole amount furnished, although only a portion has been used in the construction and the rest was then upon the premises, the only reason why the same was not used being in consequence of the contractor having suspended work. But see dissenting opinion, which holds the rule of the text to be applicable (6 Wash. 624).

As to necessity of actual use of materials in the building, see Whittier v. Stetson & P. M. Co., 6 Wash. 190, 33 Pac. Rep. 393, 36 Am. St. Rep. 149; Pacific R. M. Co. v. James Street Const. Co., 68 Fed. Rep. 966, 970, 16 C. C. A. 68, 29 U. S. App. 698; Seattle L. Co. v. Sweeney (Wash.), 85 Pac. Rep. 677; Knudson-Jacob Co. v. Brandt (Wash.), 87 Pac. Rep. 43.

[27] Tibbetts v. Moore, 23 Cal. 208, 214.

[28] Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, **32**, 74 Pac. Rep. 357.

See **Kerr's Cyc. Code Civ. Proc.,** § 1200.

Washington. Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 Pac. Rep. 1106.

[29] **Montana.** So illuminating-oil, mica-grease, lubricating-oil, and gasolene for fuel, used in a mining plant, are not materials, within § 2130 of the Code of Civil Procedure, as they do not enhance the value nor become a part of the machinery, fixtures, or building: A. M. Holter H. Co. v. Ontario M. Co., 24 Mont. 198, 61 Pac. Rep. 8, 81 Am. St. Rep. 421.

road are not articles for which the statute provides a lien;[30] and deer and bear meats furnished for laborers on a mine are not proper materials upon which to base a lien.[31] Likewise as to money advanced expressly for payment of materials or labor in the erection of a building;[32] and lumber used in building temporary houses in the construction of a railroad,[33] or in "preliminary work" on a canal,[34] or material for a temporary structure, not in the nature of a fixture, used and destroyed, pari passu, with the erection of the

[30] Gordon H. Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 622, 25 Pac. Rep. 125.

Arizona. Lien for tools, machinery, and fixtures: Rev. Stats., § 2258.

Colorado. Steel and candles were held a proper basis of lien: Keystone M. Co. v. Gallagher, 5 Colo. 23 (1872).

Hawaii. See Hackfeld v. Hilo R. Co., 14 Hawn. 448, 455 (tools).

Oklahoma. Not lightning-rods: 2 Rev. and Ann. Stats. 1903, (4828) § 630.

Oregon. Not appliances and tools for raising and moving houses: Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Id. 54.

[31] Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772. It seems that in Eaton v. Rocca, 75 Cal. 93, 94, 16 Pac. Rep. 529, an attempt was made to foreclose a lien for the board of certain laborers on the mine, but the case went off on another point, and no reference was made in the opinion as to the character of the materials.

Washington. Likewise no lien for "provisions": Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 Pac. Rep. 1106.

[32] Cadenasso v. Antonello, 127 Cal. 382, 385, 59 Pac. Rep. 765; Godeffroy v. Caldwell, 2 Cal. 489, 492, 56 Am. Dec. 360 (the well-known principle of equitable conversion, as administered in admiralty, being inapplicable).

Hawaii. Hackfeld v. Hilo R. Co., 14 Hawn. 448.

Money advanced or lent to a contractor, to be used in erecting building, furnishing material therefor, or in payment of laborers thereon, furnishes no basis for a mechanic's lien on the premises: Godeffroy v. Caldwell, 2 Cal. 489, 492, 56 Am. Dec. 360; Cadenasso v. Antonello, 127 Cal. 382, 386, 59 Pac. Rep. 765 ("money advanced" is not equivalent to "labor and material"). See Steamboat James Battle v. Waring, 39 Ala. 183; First Municipality v. Bell, 4 La. Ann. 121; Ray County Sav. Bank v. Cramer, 54 Mo. App. 587; Williams v. Bradford (N. J.), 21 Atl. Rep. 331; Kerby v. Daly, 45 N. Y. 84; City of Hamilton v. Stelwaugh, 11 Ohio Cir. Ct. Rep. 182, 1 Ohio C. D. 324; Gaylord v. Laughbridge, 50 Tex. 573, 577; International B. & L. Assoc. v. Fortassain (Tex. Civ. App.), 23 S. W. Rep. 496.

[33] See Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 618, 25 Pac. Rep. 124, where the intimation seems to be to this effect, the value of such materials having been included with the value of other materials.

Hawaii. Hackfeld v. Hilo R. Co., 14 Hawn. 448, 455.

Montana. "Waste": See Marsh v. Morgan, 18 Mont. 19, 44 Pac. Rep. 85.

[34] See South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, bk. 18 L. ed. 894.

See "Nature of Labor," §§ 130 et seq., post.

permanent structure.[35] And likewise as to patterns used in the manufacture of couplings, which remained the property of the material-man;[36] and the value of the boxes in which the couplings were cased for shipment cannot be properly charged separately from the price of the couplings, where the boxes likewise remain the property of the material-man.[37] This rule seems to be placed on the ground that the charges are too remote from the actual work of construction.

§ 90. **Same. Lien, when allowed. Package.** On the other hand, however, actual incorporation of all the "furnished" material in the structure is not insisted upon in all cases. Thus where the material is usually delivered in packages, it is proper to charge for it as packed, although the small material constituting the package does not literally go into the construction of the building, or in any way make its appearance therein.[38]

Powder used for blasting in constructing a flume or tunnel, or on a mine, is material for which a lien may be had.[39]

[35] Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, 74 Pac. Rep. 357.

[36] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 66, 40 Pac. Rep. 45.

[37] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 66, 40 Pac. Rep. 45.

[38] Snell v. Payne, 115 Cal. 218, 46 Pac. Rep. 1069 (lime furnished in barrels for the construction of a building; the barrels were permitted to be included in the charge for the lime, although the barrels were not "used" and were not returned). See First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 66, 40 Pac. Rep. 45.

See "Nature of Labor," § 92, and § 130, post.

[39] In Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 201, 20 Pac. Rep. 419, Mr. Justice McFarland thought that the plaintiff had no lien for the powder furnished, and that the question was necessarily involved in the decision. The court, however, assumed that there was such a lien. On a subsequent appeal of the case (88 Cal. 20, 26), Mr. Justice De Haven, in concurring, said that the question whether the powder supplied in the work of constructing a flume or tunnel may be regarded as part of the "material used" in the construction was not involved in the disposition of the appeal, and Mr. Justice McFarland repeated his opinion that there was no lien for such material; but in an earlier case (California P. W. v. Blue Tent Consol. H. G. M. of Cal. (Cal.), 22 Pac. Rep. 391), which was not referred to in the last-mentioned opinion, it was said that it was not questioned that a material-man may have a lien for powder, and refers to Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 20 Pac. Rep. 419, as authority that a lien is given therefor.

Colorado. Keystone M. Co. v. Gallagher, 5 Colo. 23 (1872); "material to be used in or about the mine."

Oregon. Powder used in the construction of a railway: Giant P. Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470, 8 L. R. A. 700 (1885).

§ 91. Same. Carriage charges. Upon similar principles, certain labor and expenses incident to bringing the material to the building or other improvement may be included as part of the price of the material.[40] Thus cartage, where charged as a portion of the cost of the material furnished in the construction of a building, may be properly allowed as part of the price of the materials.[41] And it is thought that the cost of placing the material in situ may, under some circumstances, be regarded as a part of the cost of the material.[42]

[40] See "Distinction between Contractor and Material-man," etc., §§ 60, 68, ante.

Colorado. See Barnard v. McKenzie, 4 Colo. 251, 253 (dictum).

[41] West Coast L. Co. v. Newkirk, 80 Cal. 275, 280, 22 Pac. Rep. 23 ("the cartage,' . . . if allowed at all, was allowed as a part of the value of the materials"), **distinguished** in First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 66, 40 Pac. Rep. 45; Jones v. Kruse, 138 Cal. 613, 618, 72 Pac. Rep. 146 (cost of cartage part of cost of material). See McClain v. Hutton, 131 Cal. 132, 137, 61 Pac. Rep. 273, 63 Id. 182, 622 (allowing lien when hauling done under employment by owner's agent); and French v. Powell, 135 Cal. 636, 644, 68 Pac. Rep. 92 (suit on statutory bond, wages of blacksmith allowed; not authority for blacksmith filing mechanic's lien on property).

Compare: Adams v. Burbank, 103 Cal. 646, 37 Pac. Rep. 640 (disallowing claim of lien for hauling brick); Wilson v. Nugent, 125 Cal. 280, 57 Pac. Rep. 1008 (person hauling slate for roof on engagement of contractor not entitled to mechanic's lien).

Blacksmith sharpening tools used in a mine allowed mechanic's lien for value of his services, on ground that the tools are a part of the mine: Malone v. Big Flat G. M. Co., 76 Cal. 578, 585, 18 Pac. Rep. 772.

Boarding-house keeper not entitled to mechanic's lien for price of board furnished men working on job: Perrault v. Shaw, 69 N. H. 180, 181, 38 Atl. Rep. 724, 76 Am. St. Rep. 161. See United States v. Kempland, 99 Fed. Rep. 405.

Book-keeper on mine not entitled to mechanic's lien for value of his services: Rara Avis G. & S. M. Co. v. Boucher, 9 Colo. 385, 388, 12 Pac. Rep. 433.

See **Kerr's Cyc. Code Civ. Proc.**, § 1183, note pars. 148, 149.

Cook for men employed in construction of reservoir, not entitled to mechanic's lien for his services: McCormick v. Los Angeles City W. Co., 40 Cal. 185.

Cook in mine not entitled to mechanic's lien: See **Kerr's Cyc. Code Civ. Proc.**, § 1183, note pars. 148, 149.

Watchman in mine not entitled to mechanic's lien for his services: See **Kerr's Cyc. Code Civ. Proc.**, § 1183, note pars. 148, 149.

Distinguishing the case of Adams v. Burbank, 103 Cal. 646, 651, 37 Pac. Rep. 640, as being the claim of lien of a material-man's laborer, who in no event has a lien.

Freight charges and cartage. The rule in the text was likewise applied to freight and cartage: See Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 618, 25 Pac. Rep. 124.

Montana. See Eccleston v. Hetting, 17 Mont. 88, 42 Pac. Rep. 105.

[42] See § 60, ante.

Building as material. The materials may be in a more or less crude state; but, on the other hand, under certain circumstances, even a completed building may be considered to be "materials furnished." Thus where the defendant employed the plaintiff to erect certain improvements upon a lot owned by the former, and, as part thereof, plaintiff was to place on the lot a small frame house, which he had previously constructed, and make certain additions thereto, and for the house plaintiff was to receive a certain sum, with all of which plaintiff complied, it was held that although the mechanic's-lien law probably did not confer a lien for the price of a building already constructed and then sold to be put upon a lot, yet, where such building was to become part of a larger structure, under the agreement, and it was so used, it may be regarded as material furnished for that purpose.[43]

§ 92. Same. Nature of the work on the property for which the materials are furnished. Since the material must be actually used in the repair or improvement,[44] it is obvious that work or labor in which the material may be used must be performed. Under section eleven hundred and eighty-three.[45] material-men have a lien only for material furnished and used "in the construction, alteration, addition to, or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon-road, or other structure." The words, "construction, alteration, addition to, or repair," are given different meanings in the decisions, as will be fully developed in the following sections.

§ 93. Same. Alteration, construction, addition to, repair. In filing a claim of lien, one must consider whether the

[43] Selden v. Meeks, 17 Cal. 128, 132, decided under the act of April 19, 1856 (Stats. 1856, p. 203, § 1), providing that "artisans, builders, mechanics, lumber merchants, and all other persons performing labor or furnishing materials for the construction or repairing of any building, wharf, or other superstructure shall have a lien," etc.

Alaska. Compare: Chambers v. Harnum, 1 Alaska 468.

[44] See § 82, ante.

[45] **Kerr's Cyc. Code Civ. Proc., § 1183.**

contract is for the construction of a building, or for the alteration, addition to, or repair of a building already constructed, and the statement made to conform to the facts in the particular case. If claim is made for one class of work, and the contract or the proof shows another class of work, the variance is fatal to the lien, under the decisions.[46]

Laborer. Material-man. A distinction is drawn between laborers and material-men in this connection. While a laborer performing labor upon any of the objects enumerated above may have a lien on the property, a material-man seems to be restricted, under the provision of this section, to the "construction, alteration, addition to, or repair" thereof.[47] If the work does not fall within the definition of "construction, alteration, addition to, or repair" of the objects mentioned, it is not within the purview of this clause of the section of the California code, so far as the lien of a material-man is concerned.[48]

§ 94. **Same. Extent of alteration or repair.** The "alteration" of a building need not necessarily be as to its framework, or a change in its form or structure. If the alteration is such as to adapt it to other than its original uses, it is sufficient. Thus where machinery was furnished to be used, and was used, as a part of a building, to convert it

[46] Eaton v. Malatesta, 92 Cal. 75, 76, 28 Pac. Rep. 54; Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195; Fernandez v. Burleson, 110 Cal. 164, 167, 42 Pac. Rep. 566, 52 Am. St. Rep. 77 (description must be sufficient); Santa Monica L. & M. Co. v Hege, 119 Cal. 376, 380, 381, 51 Pac. Rep. 555 (variance between pleading and proof; incorrect statement as to price). See McGinty v. Morgan, 122 Cal. 103, 105, 54 Pac. Rep. 392; Wilson v. Nugent, 125 Cal. 280, 283, 57 Pac. Rep. 1008; Morrison v. Willard, 17 Utah 306, 309, 311, 53 Pac. Rep. 832, 70 Am. St. Rep. 786, 787.

But see Ward v. Crane, 118 Cal. 676, 677, 50 Pac. Rep. 839 (when contract was to demolish old and erect new building, some materials from old going into new building, claim for new building held sufficient).

See "Labor for Which a Lien is Given," §§ 130 et seq., post; and "Object of Labor," §§ 166 et seq., post.

[47] Palmer v. Lavigne, 104 Cal. 30, 32, 37 Pac. Rep. 775 (a lien for labor). See Williams v. Santa Clara M. Assoc., 66 Cal. 193, 197, 5 Pac. Rep. 85, 4 West Coast Rep. 616.

See "Nature of Labor," §§ 130 et seq., post.

[48] But, as shown below, the practical application of this distinction is very much limited by the fact that if the material is affixed it is sufficient for the lien.

into a sugar-refinery, a lien was given, on the theory that the work was "construction" or "repair" of the building.[49]

§ 95. Same. Fixtures. If the material becomes part of the building or affixed to it, it is a sufficient use of the material to enable the material-man to have a lien, under the statute.[50] Thus placing a pump in the basement of a water-works, which is planted in the ground, and connected with pipes so as to admit the steam and water,[51] falls within the principle just enunciated.

§ 96. Same. In mining claims and mines. The work of "drifting in a tunnel" on a mine is not such "construction, alteration, addition to, or repair of any building or improvement, or in a mining claim," within the meaning of section eleven hundred and eighty-three of the Code of Civil Procedure.[52] Without doing violence to the received meaning of language, a "mine," or pit sunk within a mining claim, may be called a structure. Strictly speaking, a "mining claim" cannot be constructed, altered, or repaired.[53]

[49] Donahue v. Cromartie, 21 Cal. 80, 86 (act of April 19, 1856, § 1, under which this case was decided, gave material-man a lien for materials furnished "for the construction or repairing of any building, wharf, or other superstructure"). See Goss v. Helbing, 77 Cal. 190, 191, 19 Pac. Rep. 277 (pump for water-works comes within mechanic's-lien law when).

[50] Donahue v. Cromartie, 21 Cal. 80, 86; Goss v. Helbing, 77 Cal. 190, 191, 19 Pac. Rep. 277.

Colorado. A furnace must be so affixed to a building as to become a fixture and part of the realty, and thus lose its character as personal property, to form the basis of a lien: Michael v. Reeves, 14 Colo. App. 460, 60 Pac. Rep. 577 (under 3 Mills's Ann. Stats., 1st ed., § 2867).

Montana. A cover for a stovepipe-flue, opening into a chimney from the interior of a building, and removable when such flue was to be used, is not a fixture, and does not enter into the construction of a building, and will not support a lien therefor: Missoula Mercantile Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

[51] Goss v. Helbing, 77 Cal. 190, 191, 19 Pac. Rep. 277.

[52] Jurgensen v. Diller, 114 Cal. 491, 493, 46 Pac. Rep. 610, 55 Am. St. Rep. 83.

[53] Helm v. Chapman, 66 Cal. 291, 293, 5 Pac. Rep. 352, 5 West Coast Rep. 127; Williams v. Santa Clara M. Assoc., 66 Cal. 193, 197, 5 Pac. Rep. 85, 4 West Coast Rep. 616; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 141, 34 Pac. Rep. 702, 36 Id. 388 (before amendment of 1903).

Labor and material in mine. Whether a lien is given for materials furnished for work of any kind in a mining claim, will be discussed hereafter: See § 99, post.

§ 97. Same. Street-work, grading, etc. It seems questionable whether a lien is given to a mere material-man under section eleven hundred and ninety-one of the Code of Civil Procedure, providing for grading, street-work, etc., in incorporated cities,[54] as the statute provides that the person performing the designated work "has a lien upon said lot for the work done and materials furnished." The use of the word "and" indicates that the labor and materials are in the conjunctive.

§ 98. Same. Nature of property for which material must be furnished.[55] Generally. The general character of the property upon which a lien for materials is given, as distinguished from the nature of the work on it, upon which a lien must be based under section eleven hundred and eighty-three,[56] seems to be generally the same as that for which a laborer's lien is given.

§ 99. Same. Mines and mining claims. But there are several exceptions, apparently, which will be noted at this place. Section eleven hundred and eighty-three of the Code of Civil Procedure, as amended in 1903, does not seem to

[54] **As to the constitutionality of this section,** see § 34, ante. This section of the code seems to require that the person furnishing the materials must also perform work, in order to obtain a lien; and probably such work does not fall within the provisions of the general section (**Kerr's Cyc. Code Civ. Proc.,** § 1183) giving a lien to material-men; for the work enumerated in § 1191, **Kerr's Cyc. Code Civ. Proc.,** does not seem to be work done in the "construction, alteration, addition to, or repair" of the objects mentioned in § 1183, **Kerr's Cyc. Code Civ. Proc.,** unless, perhaps, "sidewalks, areas, vaults, cellars, rooms under a sidewalk, or improvements in connection therewith" may be considered as coming within the expression "other structure," as used in § 1183, **Kerr's Cyc. Code Civ. Proc.** The expression in § 1191, "any person who . . . otherwise improves the same," has reference to the work, and not to the character of the property, and whether the expression of the same section, "make any improvement in connection therewith," refers to the work or to the character of the property does not seem to have been specially dwelt upon by the court, although the tendency appears to be to refer it to the former, rather than to the latter. See Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986; Davis v. MacDonough, 109 Cal. 547, 550, 42 Pac. Rep. 450. See "Nature of Property"; and see particularly work under § 1191, **Kerr's Cyc. Code Civ. Proc.,** and §§ 139, 156 et seq., post.

[55] See § 87, ante.

[56] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

give a lien for materials furnished by a mere material-man for a mining claim, or in or upon real property worked as a mine, in the following clause, except by implication: "Any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, or real property so worked as a mine, for the work or labor done or materials furnished by each respectively."

§ 100. Same. Lien allowed. The court has, however, construed this section as giving a lien to a material-man for materials furnished for such "mining claim" under a preceding general clause, on the theory that a "mining claim" is a "structure," and therefore falls within the category of "other structures" upon which a lien for material is given, when furnished for the "construction, alteration, addition to, or repair" thereof.[57]

[57] Silvester v. Coe Quartz M. Co., 80 Cal. 510, 512, 22 Pac. Rep. 217. This case rested upon Helm v. Chapman, 66 Cal. 291, 5 Pac. Rep. 352, which construed § 1183, **Kerr's Cyc. Code Civ. Proc.**, as it stood before 1885, giving a lien for materials upon "any mining claim . . . or other structure." The case last cited was to foreclose a laborer's lien, and decided simply that a "mine" or pit sunk within a mining claim might be called a "structure," and had particular reference to § 1185, **Kerr's Cyc. Code Civ. Proc.**, providing for the extent of the lien on the land upon which any "building, improvement, or structure" was constructed. See California Powder Works v. Blue Tent Consol. H. G. M. (Cal.), 22 Pac. Rep. 391; Hamilton v. Delhi M. Co., 118 Cal. 148, 153, 50 Pac. Rep. 378; Williams v. Mountaineer M. Co., 102 Cal. 134, 140, 34 Pac. Rep. 702, 36 Id. 388. § 1183, **Kerr's Cyc. Code Civ. Proc.**, up to the time of its amendment in 1885, so far as this question is concerned, read: "Mechanics, material-men, artisans, architects, and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, or repair of any mining claim, building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon-road, or other structure, shall have a lien," etc., and it was under this provision that the leading case of Williams v. Santa Clara M. Assoc., 66 Cal. 193, 197, 5 Pac. Rep. 85, 4 West Coast Rep. 616, was decided. The subsequent cases followed this case, apparently without observing the change in the statute, and although by the amendment of 1885 the words "mining claim" were stricken out from the properties enumerated in the first clause, and a separate clause providing for mining claims was inserted, as shown above, thus making a special mining-claim clause,

§ 101. General rights of material-men. The rights of material-men have their roots in the constitution of California, and they have a constitutional mandatory lien.[58] Their general rights and remedies are in many respects similar to those of subcontractors.[59]

The general rules as to privity of contract apply. Thus the original contractor is not liable to the subcontractor's

substantially the same as it stood in 1874 and before it was modified in 1880. However, in Williams v. Mountaineer M. Co., 102 Cal. 134, 139, 34 Pac. Rep. 702, 36 Id. 388, this change was noticed, and the court said: "The use of the phrase 'other structure,' in the above extract, shows that the word 'structure' comprehends all the properties specifically enumerated, and is broad enough to include any similar thing constructed, should the enumeration prove incomplete. Following this with the language, 'and any person who,' it would seem to show that a mining claim was not included in the structures upon which liens were allowed, . . . and the proceeding provided for." See Parke and Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 82 Pac. Rep. 51 (materials furnished for a well, under first clause of § 1183, **Kerr's Cyc. Code Civ. Proc.**).

See also "Nature of Labor," §§ 130 et seq., post; and "Character of Property," §§ 166 et seq., post.

Utah. Mill, manufactory, hoisting-works: Rev. Stats., § 1397.

Wyoming. Materials for mining claim: Rev. Stats. 1899, § 2869.

[58] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws,** p. civ.

Material-man's right to lien upon the property for which he has furnished the material is of constitutional creation, and is based upon the theory that he has an equitable right to payment for it from the owner of the building into which it has gone: Hampton v. Christensen, 148 Cal. 737, 84 Pac. Rep. 200; Humboldt Mill Co. v. Crisp, 146 Cal. 686, 81 Pac. Rep. 31, 106 Am. St. Rep. 75, 2 Am. & Eng. Ann. Cas. 811; Los Angeles Pressed Brick Co. v. Los Angeles P. B. & D. Co. (Cal. App., Jan. 23, 1908), 94 Pac. Rep. 775.

Furnishing material for use in building is basis for lien under statute: Los Angeles Pressed Brick Co. v. Los Angeles P. B. & D. Co., supra.

[59] See §§ 71-76, ante; "Notice to Owner"; "Impairment of Liens"; "Alteration of Contract"; "Waiver"; "Time of Filing Claim."

Personal action against purchaser of material: See Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860 (against contractor).

See "Cumulative Remedies," §§ 638 et seq., post; also "Bond," §§ 281 et seq., post; "Sureties," §§ 605 et seq., post; "Answer," §§ 738 et seq., post; "Estoppel by Knowledge of Void Contract," §§ 319 et seq., post.

Enforcement of lien independently of contract: See **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1184, 1202, and notes; "Void Contract," §§ 319 et seq., post; "Conspiracy," § 314, post; "Payments," §§ 269 et seq., post. As to abandonment by original contractor, see **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1184, and notes; § 358, post; "Obligations of Owner," § 127, post.

As to privity of contract between contractor's material-man and owner, see Simpson v. Gamache, 134 Cal. 216, 218, 66 Pac. Rep. 222.

material-men, in the absence of privity.[60] The material-man must perform his contract, under the general principles of law, unless prevented by the purchaser.[61] The owner, who is also a member of a firm of material-men, furnishing materials for the building, seems also to have some of the rights of a material-man, as such.[62]

Material-men have a right of action upon the bond given by a contractor, when materials or "supplies" have been furnished and used for work on public buildings, excavating, or other mechanical work, under the act of March 27, 1897.[63]

Material-men under a contractor, in all cases, have priority as to their liens over subcontractors under the same contractor;[64] but, as heretofore shown, they stand in the same rank with the other constitutional mandatory liens.[65]

When materials are furnished for use in a building or improvement, and have not actually been used, they are subject to execution, attachment, or other legal process, at the instance of the material-man, only to enforce the debt for the purchase-money.[66]

§ 102. General obligations of material-men. Generally speaking, the duties which material-men owe to the owner or purchaser are the measure of their rights. Thus the duties to give notice to intercept payments, or to file a claim of lien, or to carry out their contracts, and the like, are all necessary, in order to secure and preserve the material-man's rights as against the owner, and it is therefore not necessary to repeat here what was said elsewhere.[67]

[60] Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. Rep. 442.

[61] See San Pedro L. Co. v. West (Cal. App.), 86 Pac. Rep. 993.

[62] See Dunlop v. Kennedy (Cal., Aug. 31, 1893), 34 Pac. Rep. 92.

[63] Cal. Stats. 1897, p. 201, **Henning's General Laws,** p. 1104.

See "Rights of Subcontractors," §§ 70-75, ante.

Hawaii. A material-man of a subcontractor has a lien, although he has no contract with the owner, and may rely both on the lien and on the personal liability of the subcontractor: Hackfeld v. Hilo R. Co., 14 Hawn. 448, 452.

[64] **Kerr's Cyc. Code Civ. Proc.,** § 1194, and note.

See "Priorities," §§ 486 et seq., post.

[65] See § 37, ante.

[66] **Kerr's Cyc. Code Civ. Proc.,** §§ 690, 1196, and notes.

See "Cumulative Remedies," §§ 638 et seq., post; "Provisional Remedies," §§ 645 et seq., post.

[67] See § 82, ante.

§ 103. **Same. Knowledge of terms of original contract. Fraud.** The contractor's material-man is not required to concern himself with the question as to whether or not material ordered by the contractor measures up to the requirements of the original contract. His contractual relations are solely with the contractor dealing with him, and he simply furnishes material as directed by the party with whom he contracts. He is under no legal obligation to the owner to see to it that the contractor complies with his contract, and, so far as his right to a lien is concerned, is warranted in assuming that the contractor is fulfilling his contract with the owner. This is true, notwithstanding he may know that material ordered may not be in all respects as provided by the original contract on file. That contract is subject to change and modification in such matters by the parties thereto — the owner and original contractor — without notice to other parties; and such material-man has a right to assume that no fraud is being perpetrated by the contractor upon the owner in the use of the materials ordered; and in the absence of fraud or conspiracy, the material-man's lien is not affected by such knowledge.[68]

[68] Howe v. Schmidt (Cal. Sup., June 22, 1907), 90 Pac. Rep. 1056. See § 85, ante.

CHAPTER VII.

PERSONS PERFORMING LABOR.

§ 104. Scope of chapter.
§ 105. Statutory provision.
§ 106. Constitutional provision.
§ 107. Laborer distinguished from contractor, subcontractor, and material-man.
§ 108. Laborer does not create intermediate lien-holders.
§ 109. Personal services.
§ 110. Definitions. Various kinds of laborers.
§ 111. Nature of labor for which lien is given.
§ 112. General rights of laborers. Similar to those of material-men.
§ 113. Same. Priorities.
§ 114. Same. Material-man's laborers.
§ 115. Same. Death of employer.
§ 116. Same. Public work.
§ 117. General obligations of laborers.
§ 118. Same. Death of employer.

§ 104. Scope of chapter. The general classification of persons performing labor, without reference to the particular character of the work, and the general rights and obligations,[1] will be briefly considered in this chapter, leaving the development thereof to subsequent portions of the work.

§ 105. Statutory provision. Section eleven hundred and eighty-three of the Code of Civil Procedure enumerates: "Mechanics, . . . artisans, architects, machinists, builders, miners, and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part," of the objects set forth in the section, "shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished; . . . and any person

[1] **Washington.** See, generally, Vincent v. Snoqualmie M. Co., 7 Wash. 566, 35 Pac. Rep. 396.

who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process, has a lien upon the same . . for the work or labor done or materials furnished by each respectively." [2]

§ 106. Constitutional provision. Of the persons enumerated in section eleven hundred and eighty-three of the Code of Civil Procedure, "mechanics, artisans, and laborers of every class" are specifically mentioned in the constitution.[3] Before the adoption of the constitution of 1879, section eleven hundred and eighty-three enumerated only one general class, namely, "every person performing labor upon" the properties therein mentioned.[4]

§ 107. Laborer distinguished from contractor, subcontractor, and material-man. The persons enumerated in section eleven hundred and eighty-three are clearly distinguishable from the classes heretofore treated; namely, original contractors, subcontractors, and material-men. Thus the owner's laborer, or a person directly employed by the owner to do personal, manual labor upon a building, is not an original contractor.[5]

§ 108. Laborer does not create intermediate lien-holders. When a person, who would be classified as a "laborer,"

[2] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[3] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws,** p. civ. See "Classification," §§ 42-44, ante, and also §§ 28, 37, ante.

[4] In the discussion of this subject, the laborer, mechanic, etc., employed by the owner to give his personal services will be designated as the "owner's laborer," "owner's mechanic," etc.; those of the original contractor, as the "original contractor's laborer," etc.; of the subcontractor, as the "subcontractor's laborer," etc.; of the material-man, as the "material-man's laborer," etc.

"Person performing labor" is a generic expression, more extensive in meaning than "laborer," but in the following discussion the word "laborer" will generally be used, as more convenient, for that phrase.

[5] See Sparks v. Butte County G. M. Co., 55 Cal. 389, 392 (dictum). See "Original Contractor," §§ 45-65, ante.

In Malone v. Big Flat Gravel Mining Co., 76 Cal. 578, 585, 18 Pac. Rep. 772, the original contractor's laborers are rather loosely termed "subcontractors."

enters into a contract whereby he may create intermediate lien-holders by contracts with others, to whom he is liable, he ceases to be a "laborer," and falls into one of the other classes.[6]

§ 109. Personal services. The contracts of "laborers" seem to be to labor personally, and not to furnish labor; to work, and not for work to be done.[7]

§ 110. Definitions. Various kinds of laborers. Many of the terms mentioned above are more or less synonymous, although clear distinctions can be drawn between some of them; the degree of skill, the character of the work, and the relation to the actual, ultimate work, being the principles of differentiation. Various definitions will be found in the note.[8]

[6] See "Original Contractor," §§ 45-65; "Subcontractor," §§ 66, 76, ante.

[7] See Malone v. Big Flat G. M. Co., 76 Cal. 578, 585, 18 Pac. Rep. 772. **Utah.** But see Rev. Stats., § 1383.

[8] **Architects** will be fully treated in chapter viii, post. See Libbey v. Tidden, 192 Mass. 175, 7 Am. & Eng. Ann. Cas. 617. See also authorities 2 Am. & Eng. Ann. Cas. 714; 7 Am. & Eng. Ann. Cas. 617.

Builder. "One who or that which builds; especially, one who follows the occupation of building or who controls and directs the actual work of building": Standard Dictionary. "1. One who builds; one whose occupation is to build, as a carpenter, a shipwright, or a mason. 'In the practice of civil architecture the builder comes between the architect who designs the work and the artisan who executes it'": Webster. "One who builds, or whose occupation is that of building; specifically, one who controls or directs the work of construction in any capacity": Century Dictionary.

Artisan. "One trained to manual dexterity in some mechanic art or trade; a handicraftsman; a mechanic": Webster. "One who practises an industrial art; a trained workman; superior mechanic; distinguished from 'artist.' . . . The man who constructs anything by mere routine and rule is a mechanic. The man whose work involves thought, skill, and constructive power is an artificer. The hod-carrier is a laborer; the bricklayer is a mechanic; the master mason is an artificer. Those who operate machinery nearly self-acting are operatives": Standard Dictionary.

Mechanic. "One who works with machines or instruments; a workman or laborer, other than agricultural; an artisan; an artificer; more specifically, one who practises any mechanic art, one skilled or employed in shaping and uniting materials, as wood, metal, etc., into any kind of structure, machine, or other object, requiring the use of tools, or instruments": Webster. "One skilled in the mechanic arts or exercising a mechanical employment; one who has the art of using tools in shaping wood, metal, etc.; a handicraftsman; an artisan": Standard Dictionary. "A maker of machines or machinery; hence, any

§ 111. Nature of labor for which lien is given. Although a person may clearly fall within the general definition of

skilled worker with tools; one who has learned a trade; a workman whose occupation consists in the systematic manipulation and constructive shaping or application of materials; an artificer, artisan, or craftsman": Century Dictionary.

Arizona. Rev. Stats., § 2258.

In Selden v. Meeks, 17 Cal. 128, 132, the "contractor" is called a "mechanic."

Machinist. "A constructor of machines and engines; one versed in the principles of machines": Webster. "1. One who makes or repairs machines, or is versed in their design or construction, or in the use of metal-working tools. 2. (Rare.) One who tends a machine": Standard Dictionary. "1. A constructor of machines and engines, or one versed in the principles of machines; in a general sense, one who invents or constructs mechanical devices of any kind": Century Dictionary.

Miner. "One who mines; a digger for metals and other minerals": Webster. "1. One who mines, in any sense; especially, one whose occupation it is to excavate ore, coal, etc., in a mine": Standard Dictionary. "1. One who mines; a person engaged in digging for metals or minerals, or in forming a military or other mine": Century Dictionary.

See "Nature of Labor in a Mining Claim," §§ 132, 149 et seq., post.

Colorado. The laborer's knowledge of mining does not seem to affect his lien: Ontario-Colorado G. M. Co. v. Mackenzie, 19 Colo. App. 298, 74 Pac. Rep. 791.

Laborer. "One who labors in a toilsome occupation; a man who does work that requires little skill, as distinguished from an artisan; sometimes also called laboring man": Webster. "One who performs physical or manual labor; especially, one who for hire performs any physical labor requiring little skill or training, other than regular domestic service; one who gains a living by manual toil. In lien laws, 'laborer' does not include contractors, civil engineers, or the like, nor hotel cooks": Standard Dictionary. "1. One who labors or works with body or mind, or both; specifically, one who is engaged in some toilsome physical occupation; in a more restricted sense, one who performs work which requires little skill or special training, as distinguished from a skilled workman; in the narrowest sense, such an unskilled workman engaged in labor other than that of a domestic servant, particularly in husbandry": Century Dictionary.

New Mexico. Definition of "laborer": Boyle v. Mountain Key Min. Co., 9 N. M. 237, 50 Pac. Rep. 347.

Persons performing labor in a mining claim, etc. These expressions are probably intended to include persons whose calling is not that of a laborer, or who do not gain their livelihood by labor, but who may nevertheless perform some labor upon a building, etc., or in a mining claim, etc.

"Laborers." See note 58 Am. St. Rep. 303.

"Laborer," "workman," or "servant," who is, within the meaning of the statute relating to mechanics' liens: See notes 32 Am. Rep. 264; 18 L. R. A. 305.

Engineers are not specifically mentioned in the California statutes, and, if entitled to a lien, must come within the purview of the other persons mentioned, for instance, "laborers," or "persons performing labor."

any of the classes named in this chapter, still no lien may be given, under the constitution or the statute. The labor must be "in or upon" the objects enumerated in the statute. The nature of the labor and its relation to the object of the labor are important considerations in determining whether a lien has been granted by the law. Furthermore, even though the labor be of the proper nature and bear a sufficient relation to the object, it must appear that the object itself is of the nature provided. These matters will be considered in detail later.[9]

§ 112. General rights of laborers. Similar to those of material-men. The rights of laborers are in many respects similar to those of material-men, likewise provided for in the constitution. The rules applying to and governing them are, however, in some particulars, different. Unlike the material-man, the laborer need not have been originally hired to do the particular work for which the lien is claimed. Of course, the laborer must do the work, for which he claims a lien, on the property sought to be charged therewith, and when he does this, the nature and object of the labor being within the statute, he has complied with the law — he has "performed labor" upon the particular premises.[10]

Laborer's lien on money attached: See Rauer v. Silva, 128 Cal. 42, 60 Pac. Rep. 525, and **Kerr's Cyc. Code Civ. Proc.**, § 1206, and note.

Action for services during construction of building; breach; reasonable value: See Davidson v. Laughlin, 138 Cal. 320, 71 Pac. Rep. 345.

[9] See "Nature of Labor," ch. ix, post; "Object of Labor," ch. x, post.

See, generally, as to rights of employees, **Kerr's Cyc. Civ. Code**, §§ 1965-2079, and notes.

[10] Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41. The method by which the laborer's compensation is fixed is immaterial, whether by the day, week, or month; it could not continue longer than the work on the building or structure continued, and it should be treated like any other lien for labor or materials: Id.

Employment as carpenter, at a fixed rate per day, for the erection or alteration of a building, entitles the person thus employed to a lien for his wages, even though the amount exceeds, in the aggregate, one thousand dollars; and his claim to a lien is not rendered void by reason of the fact that the employment was not under a contract in writing, duly executed and filed, for the reason that such employment was neither for a definite time, nor for a definite amount of work: Farnham v. California Safe D. & T. Co. (Cal. App., May 18, 1908), 6 Cal. App. Dec. 721, 96 Pac. Rep. 788.

§ 113. **Same. Priorities.** Laborers stand upon the same footing as other constitutional mandatory lienors with regard to the priority of their liens, as heretofore shown.[11]

§ 114. **Same. Material-man's laborers.** A mere material-man's laborers, however, generally have no lien,[12] and notice from such persons to the owner to stop payment to the material-man is of no avail.[13]

§ 115. **Same. Death of employer.** When an employer dies, and it is necessary for the employee to continue his services to protect the employer's successor from loss, the latter must compensate the employee for such services, according to the terms of the contract.[14]

§ 116. **Same. Public work.** A person who performs labor for any contractor to whom is awarded a contract for the execution or performance of any building, excavating, or other mechanical work for the state, or for any county, city and county, city, town, or district, has also a remedy against the sureties on the bond specified in section one of the act of March 27, 1897.[15]

§ 117. **General obligations of laborers.** The duties of contractors' and subcontractors' laborers, like those of their material-men, are, in general, the measure of their rights.[16]

§ 118. **Same. Death of employer.** Notice of the death of the employer, as a general rule, puts an end to an em-

Washington. Lien need not be referred to in the agreement, under 2 Ballinger's Ann. Codes and Stats., § 5902 (clearing land): Stringham v. Davis, 23 Wash. 568, 63 Pac. Rep. 230.

[11] See "Constitutional Aspects," § 37, ante.

[12] Adams v. Burbank, 103 Cal. 646, 451, 37 Pac. Rep. 640.

See "Definition of Material-man," § 78, ante.

[13] See Hinckley v. Field's B. & C. Co., 91 Cal. 136, 140, 27 Pac. Rep. 594. See "Definition of Material-man," § 78, ante. See §§ 69, 79 et seq., ante.

[14] **Kerr's Cyc. Civ. Code,** § 1998, and note.

See § 118, post.

[15] Stats. and Amdts. 1897, p. 201, **Henning's General Laws,** p. 1104.

[16] See §§ 102, 103, ante. See, generally, **Kerr's Cyc. Civ. Code,** §§ 1965-2003, and notes.

ployment from month to month, but an employee, unless the term of his service has expired, or unless he has a right to discontinue at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after such notice of the facts has been communicated to such successor;[17] and, in the absence of special circumstances, the period from January 15th to June 30th is not a reasonable time.[18]

[17] Kerr's Cyc. Civ. Code, § 1998, and note; Weithoff v. Murray, 76 Cal. 508.

See § 115, ante.

[18] Weithoff v. Murray, 76 Cal. 508, 510.

CHAPTER VIII.

ARCHITECTS.

§ 119. Architects. Their regulation.
§ 120. Statutory provisions.
§ 121. Definition of "architect."
§ 122. Contract of unlicensed architect.
§ 123. Rights of architects.
§ 124. Right to lien.
§ 125. Powers of architect.
§ 126. Relation between owner and architect.
§ 127. Same. Agent of owner.
§ 128. Architect as subcontractor.
§ 129. Obligations of architects.

§ 119. Architects. Their regulation. The profession of architecture has grown to be of such great public importance, that its legislative control is sufficiently justified. Modern methods of construction, and considerations of public health and safety, have been the means of causing the enactment of laws requiring applicants for certificates to practise architecture to be examined and licensed by a state board of architecture,[1] and this legislation has been held to be constitutional.[2]

Municipal ordinances and building rules and regulations constitute a body of law, which, analogous to "medical jurisprudence," might properly be designated "architectural" or "structural" jurisprudence, with which architects and engineers are required by professional necessities to familiarize themselves.

[1] Stats. 1901, ch. ccxii, p. 641, as amended by Stats. 1903, p. 522, **Henning's General Laws,** p. 51.

[2] Ex parte McManus, 151 Cal. 331, 338, 90 Pac. Rep. 702.

Adoption of unreasonable rules by the board of architecture does not affect the validity of the act, but would merely constitute a violation of its provisions: Ex parte McManus, supra.

The matter is ruled by the principle applicable to the admission of attorneys at law to practice: Ex parte McManus, supra. See Ex parte Gerino, 143 Cal. 412, 417, 77 Pac. Rep. 166, 66 L. R. A. 249; Ex parte Whitley, 144 Cal. 167, 179, 77 Pac. Rep. 879, 1 Am. & Eng. Ann. Cas. 13; Kettles v. People, 221 Ill. 221, 77 N. E. Rep. 472; State v.

§ 120. **Statutory provisions.** Section eleven hundred and eighty-three of the Code of Civil Procedure provides: "Architects, . . . performing labor upon or furnishing material to be used in the construction, alteration, addition to, or repair" of any of the structures mentioned therein have a lien upon the property upon which they have bestowed labor or for which they have furnished material, for the value of the same; and "every . . . architect, . . . or other person having charge of any mining, or of the construction, alteration, addition to, or repair . . . of any building or other improvement, as aforesaid, . . . shall be held to be the agent of the owner for the purposes of this chapter." [3]

§ 121. **Definition of "architect."** An architect is a person skilled in the drafting of plans and specifications for the erection of buildings and other edifices, and in the execution and superintendence thereof. Various other definitions of architect are given in the note.[4] Some of his functions are now prescribed by statute.

§ 122. **Contract of unlicensed architect.** It has been held that the contract of employment of an architect is not rendered illegal or void because made in advance of the issuance of the certificate or license to the architect, under the act to regulate the practice of architecture, approved March

Knowles, 90 Md. 646, 45 Am. Rep. 877, 49 L. R. A. 695; In re Thompson, 36 Wash. 377, 78 Pac. Rep. 899, 2 Am. & Eng. Ann. Cas. 149.

[3] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

Washington. Compare: Cadwell v. Brackett, 2 Wash. 321, 26 Pac. Rep. 219.

[4] **Architect.** "1. One skilled in practical architecture; one whose profession it is to devise the plans and ornamentation of buildings or other structures and to direct their construction. 2. One who contrives, plans, makes, or builds up something; as, the architect of one's own fortune. Once the architect and the builder were one. Now the architect may do no more than simply furnish the designs to the builder": Standard Dictionary. "A person skilled in the art of building; one who understands architecture, or makes it his occupation to form plans and designs of buildings and superintends the artificers employed": Webster. "A person skilled in the art of building; one who understands architecture and whose profession it is to form plans and designs of buildings and superintend the execution of them": Century Dictionary.

23, 1901, though, in order to carry out the contract, it would be necessary for the architect to obtain his certificate.[5]

§ 123. Rights of architects. The architect has the ordinary remedies under his contract with the owner for breach thereof.[6] Where an owner, under an entire contract, employs an architect to oversee the construction of a building, repudiates the contract in part and orders such part of the work not to be done, the architect can either treat the repudiation of a part as a breach of the entire contract, and discontinue all work, or he can waive the breach as to all other parts of the work not included in the part repudiated, by continuing the work. By such repudiation of part, however, the architect may consider the entire contract broken, and he will be discharged from the performance of further conditions on his part.[7] Where there is an implied agreement to pay the architect the regular fees, there being no evidence of a custom of the profession as to the time of payment, the employer is liable only upon completing the work, and in the absence of an agreement to the

[5] Fitzhugh v. Mason, 2 Cal. App. 220, 223, 83 Pac. Rep. 282. But see San Francisco v. Buckman, 111 Cal. 25, 29, 43 Pac. Rep. 396; Flinn v. Mowry, 131 Cal. 481, 488, 63 Pac. Rep. 724; Berka v. Woodward, 125 Cal. 119, 126, 57 Pac. Rep. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; Kutchin v. Engelbret, 129 Cal. 635, 639, 62 Pac. Rep. 214; Gardner v. Tatum, 81 Cal. 370, 22 Pac. Rep. 880; Lada v. Hawley, 57 Cal. 51; Swanger v. Mayberry, 59 Cal. 91.

[6] **Contract for drawing plans and specifications** for public-school house: See Brown v. Board of Education, 103 Cal. 531, 535, 37 Pac. Rep. 503.

Arizona. Where the architect agrees to perform services in drafting of plans and specifications and superintending the construction of a building for an agreed compensation, the breach of the contract on the part of the owner is non-payment of such compensation, and not the mere refusal of the owner to permit the architect to perform the agreed services: McPherson v. Hattich (Ariz., March 30, 1906), 85 Pac. Rep. 731.

[7] De Prosse v. Royal Eagle Dist. Co., 135 Cal. 408, 411, 67 Pac. Rep. 502.

Repudiation of part breach of entire contract; option of plaintiff to consider breach of covenant repudiates breach of entire contract: De Prosse v. Royal Eagle Dist. Co., supra. See Haskell v. McHenry, 4 Cal. 411; Cockley v. Brucker, 54 Ohio St. 214.

As to breach of contract, see **Kerr's Cyc. Civ. Code**, § 3294, note pars. 11, 12.

See "Performance of Contract, Generally," §§ 334 et seq., post.

contrary, the employer may discontinue the employment, at his option, paying the architect for services rendered and expenses incurred.[8]

§ 124. Right to lien.[9] An architect, under the statute, occupies a somewhat anomalous position. The preparation of plans and specifications and the superintendence of the construction would seem to make the architect, in a certain sense, a laborer "in" or "upon" the property; but such lien has been allowed under the express provision of the statute.[10]

§ 125. Powers of architect. Architects, and also engineers, are often made arbiters as to the quality and quantity of the work, under the original contract, and, although the statutory or common-law agent of the owner, must act with fairness to all parties interested. They should not withhold stipulated certificates due the contractor, arbitrarily or

[8] Fitzhugh v. Mason, 2 Cal. App. 220, 224, 83 Pac. Rep. 282 (evidence, damage, finding).

[9] **Right of architect to a lien:** See notes 7 Am. & Eng. Ann. Cas. 6, 17; 16 L. R. A. 600.

Action by architect, form: See 6 Cyc. 46.

Parties: See 6 Cyc. 46.

Conditions precedent: Kerr's Cyc. Civ. Code, § 1349, note pars. 1-14; 6 Cyc. 47.

Idaho. See Lockhart v. Rollins, 2 Idaho 540, 21 Pac. Rep. 413, 415.

[10] In Ehlers v. Wannack, 118 Cal. 310, 50 Pac. Rep. 433, a lien was allowed for the reasonable value of services rendered as an architect in drawing and preparing plans and specifications, but no reference was made to the labor of supervision; and in Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 42 Pac. Rep. 154, there was a claim for services of an architect in the preparation of plans and specifications and as superintendent during the progress of construction, but no question as to the architect's rights was discussed.

Colorado. See "Labor for Which a Lien is Given," §§ 130 et seq., post.

New Mexico. An architect who prepares plans and specifications for a building and superintends the construction thereof, explaining the plans to the mechanics, personally inspecting the material and work, is entitled to a lien: Johnson v. McClure, 10 N. M. 506, 62 Pac. Rep. 983, **distinguishing** Boyle v. Mountain Key Min. Co., 9 N. M. 237, 50 Pac. Rep. 347.

Oregon. See Leick v. Beers, 28 Oreg. 483, 43 Pac. Rep. 658; Willamette Falls T. & M. Co. v. Remick, 1 Oreg. 169.

Utah. § 1372, Rev. Stats., provides specially for the drawing of plans, etc.

Washington. See Nason v. Northwestern M. & P. Co., 17 Wash. 142, 49 Pac. Rep. 235; Spalding v. Burke, 33 Wash. 679, 74 Pac. Rep. 829.

upon caprice,[11] nor upon objections based upon their own mistakes in formulating the plans and specifications;[12] and, of course, such withholding should not be tainted with fraud.

§ 126. Relation between owner and architect. It has been held that the relation between the owner and his architect is in no sense confidential, within the meaning of the provision of the Code of Civil Procedure.[13]

§ 127. Same. Agent of owner. Under the California statute, the architect is made the agent of the owner for the purposes of the provisions relating to mechanics' liens,[14] and may bind the owner by notice of the claims of the contractor's subclaimants, to intercept payments to such contractor.[15] The powers of architects and engineers as agents of the owner, and the effect of their certificates, will be more fully considered hereafter.[16]

§ 128. Architect as subcontractor. Where the architect is a subcontractor in the first degree, his contract with the

[11] Wyman v. Hooker, 2 Cal. App. 36, 40, 83 Pac. Rep. 79 (hearing in supreme court denied). See Antonelle v. Kennedy-Shaw L. Co., 140 Cal. 309, 315, 73 Pac. Rep. 966.

Washington. See Windham v. Independent Tel. Co., 35 Wash. 166, 76 Pac. Rep. 936.

[12] Wyman v. Hooker, 2 Cal. App. 36, 39, 83 Pac. Rep. 79.

Conditions precedent of this kind are to be strictly construed against the party seeking to avail himself of them: Antonelle v. Kennedy-Shaw L. Co., supra. See Front Street M. & O. R. Co. v. Butler, 50 Cal. 574, 577; Deacon v. Blodget, 111 Cal. 416, 418, 44 Pac. Rep. 159; Southern Pac. R. Co. v. Allen, 112 Cal. 455, 461, 44 Pac. Rep. 796; Weinreich v. Weinreich, 18 Mo. App. 370; Stilwell v. Railroad Co., 39 Mo. App. 226.

As to conditions precedent, see **Kerr's Cyc. Civ. Code,** § 1439, note pars. 1-45.

[13] See **Kerr's Cyc. Code Civ. Proc.,** § 1881, and note.

[14] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

Washington. The mere fact that a person is employed as an architect does not constitute such person the general agent of his employer, his powers as agent being limited by the contract entered into between them: Sweeney v. Ætna Indemnity Co., 34 Wash. 126, 74 Pac. Rep. 1057.

As to powers of architect, see De Mattos v. Jordan, 15 Wash. 378, 385, 46 Pac. Rep. 402.

[15] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[16] See §§ 238 et seq., §§ 579 et seq., post.

original contractor is not void when the owner is fully conversant with the fact, and his mere dual position as subcontractor and architect does not render the contract void, in the absence of fraud or deception.[17]

§ 129. Obligations of architects. Where there is no agreement to the contrary, the architect is under no legal duty to keep secret the fact of a proposed improvement, or the plans thereof, and he is not liable to the owner for damages by reason of the removal of tenants from the premises upon learning of such intended changes, through the publication thereof by the architect; nor is he liable for mistakes in the construction, arising through the fault of the owner.[18]

[17] Orlandi v. Gray, 125 Cal. 372, 374, 58 Pac. Rep. 15. See Willamette S. M. & M. Co. v. Los Angeles C. Co., 94 Cal. 229, 239, 29 Pac. Rep. 629.

[18] Havens v. Donahue, 111 Cal. 297, 43 Pac. Rep. 962.

Washington. Action for architect's services; damages: See Spalding v. Burke, 33 Wash. 679, 74 Pac. Rep. 829.

CHAPTER IX.

LABOR FOR WHICH A LIEN IS GIVEN.

§ 130. Scope of chapter.
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§ 134. Same. Three grand divisions. Generally.
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§ 164. Same. Material-man's laborer.
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§ 130. Scope of chapter.[1] This chapter relates particularly to the nature of the labor, and not to the place where or object upon which it is performed. Such object may fall within the purview of the statute, and yet no lien may be given thereby, owing to the inherent nature of the work, and vice versa. Moreover, labor of a certain nature may form the basis of a lien on one class of objects, but may not necessarily do so as to another class, which may be within the terms of the statute. Again, the same labor done for one person with reference to the same object may entitle one to a lien, but may be otherwise if done for another person. The relation between the work for which a lien is claimed and the work under the original contract is also an important consideration. A careful examination of the statute in force is required to determine not only the force of precedents, but also to ascertain whether a lien has been conferred under the particular circumstances of the case, so far as this matter is concerned. The subject is closely interwoven with that of the following chapter, relating to the object upon which the labor must be performed to entitle a person to a lien.[2]

§ 131. Statutory provisions, generally. Structures. First clause. Section eleven hundred and eighty-three of the California Code of Civil Procedure [3] provides: "Mechanics . . . performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building . . . or other structure, shall have a lien," etc. This will be designated as the "first clause," or "structure clause."

[1] **As to irrigation district,** see Stone v. Harris, 146 Cal. 555, 80 Pac. Rep. 711.

Idaho. Nature of work: See, generally, dissenting opinion of Ailshie, J., in Pacific States Sav., L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 518.

Oregon. Where the statute gives a lien for specified classes of work, all other classes are impliedly excluded: Williams v. Toledo C. Co., 25 Oreg. 426, 36 Pac. Rep. 159, 42 Am. St. Rep. 799.

Washington. For clearing land (2 Ballinger's Ann. Codes and Stats., § 5902): Stringham v. Davis, 23 Wash. 568, 63 Pac. Rep. 230.

[2] "Object on Which Labor must be Performed," §§ 166 et seq., post.

Montana: See Davis v. Alvord, 94 U. S. 545, 547, bk. 24 L. ed. 283.

[3] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

§ 132. Same. Mines. Second clause. Section eleven hundred and eighty-three of the California Code of Civil Procedure further provides: "And any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process, has a lien upon the same," etc. This will be designated as the "second clause," or "mining clause."

§ 133. Same. Grading, etc. Section eleven hundred and ninety-one of the California Code of Civil Procedure provides: "Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot for his work done and materials furnished."

§ 134. Same. Three grand divisions. Generally. Thus there appears to be three grand divisions of objects upon which the labor must be performed, under the California Code of Civil Procedure, namely: 1. Upon structures, under the first clause of section eleven hundred and eighty-three; 2. In mining claims, or real property worked as a mine, under the second clause of section eleven hundred and eighty-three; and 3. Grading, etc., upon lots, streets, sidewalks, etc., under section eleven hundred and ninety-one.

§ 135. Structures and mines. In general. Section eleven hundred and eighty-three of the California Code of Civil Procedure contains two distinct and separate provisions allowing distinct classes of liens. One provision, set forth in the first clause, allows a lien for work done or materials supplied in the construction of buildings or excavations on land, which are made in the nature of an improvement, to enhance its value, or to make it more useful, or valuable for a new use. The other provision is in the second clause, and

relates to and governs the lien for work done in or upon mines, which may result either in the construction of an improvement thereon, or in the partial or total destruction thereof, by the extraction of the ore which gives it value.[4]

§ 136. Importance of fixing clause under which case falls. It is important to determine under which clause of section eleven hundred and eighty-three a case falls, in order to ascertain whether a lien has been conferred, and to ascertain the owner's obligations, and whether the lien extends to the whole property, or so much thereof as is necessary for the convenient use and occupation thereof.

§ 137. Same. Classes not mutually exclusive. The two classes of objects, and work done thereon, contained in section eleven hundred and eighty-three, are not mutually exclusive. Any building or other structure, at least for some purposes, is transferred from the first clause to the second whenever it is an adjunct or appurtenance to a mining claim; and if, for instance, a tract of land upon which a well is being drilled for the purpose of extracting mineral oil is a mining claim, the well, notwithstanding the inclusion of wells in the enumeration of structures upon which separate liens are allowed, is an essential part of the mining claim, and for that reason the lien of those who have made it extends to the whole claim, and would be lost if less was described in the lienor's claim of lien.[5]

§ 138. Definition of labor "bestowed." By the use of the word "bestowed," in section eleven hundred and eighty-

[4] Higgins v. Carlotta G. M. Co., 148 Cal. 700, 702, 84 Pac. Rep. 758, 113 Am. St. Rep. 344.

Idaho. See Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 14 Pac. Rep. 958.

[5] Berentz v. Belmont Oil M. Co., 148 Cal. 577, 581, 84 Pac. Rep. 47, 113 Am. St. Rep. 308, **reversing** s. c. (Cal. App.) 84 Pac. Rep. 45, and **explaining** Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 Pac. Rep. 702, 36 Id. 388.

As to an oil-well being a mine, see **Martin's Mining Law,** §§ 70, 176, 435.

Colorado. As to the act of 1893, p. 315, § 1 (3 Mills's Ann. Stats., § 2867) and § 8. See Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403.

three,[6] instead of "performed," the legislature intended that the labor of subcontractors need not be personal, and the expression "bestowed" means "used" or "placed."[7]

§ 139. Grading and other work under § 1191. Generally. Notwithstanding the decision of the supreme court[8] holding that section eleven hundred and ninety-one of the Code of Civil Procedure[9] is unconstitutional in so far as it attempts to impose a lien upon the lot for street-work at the instance of one who is merely reputed to be the owner, it has been held that the legislature intended to retain the lien, where the real owner himself makes the contract.[10]

§ 140. Classes, how discussed at this time. For the purpose of discussion at this time, as a matter of convenience we may consider these various classes under two heads, namely: 1. Work under section eleven hundred and eighty-three; and 2. Work under section eleven hundred and ninety-one. The question under which of these sections the work falls is of great importance as to the formalities of the contract and the necessity of giving notice of non-responsibility by the owner, and as to the rights and duties of the respective parties, and other particulars.[11]

§ 141. "Improvement," defined. Refers to object. The word "improvement," used in the expression "building or other improvement," in the first clause of section eleven hundred and eighty-three of the Code of Civil Procedure, quoted in the last preceding section, and the word "improve-

[6] **Kerr's Cyc. Code Civ. Proc., § 1183.**

[7] Macomber v. Bigelow, 126 Cal. 9, 14, 58 Pac. Rep. 312.

Washington. In Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 39 Pac. Rep. 815, a lien was sustained that was partly for labor furnished, as distinguished from labor performed: Blumauer v. Clock, 24 Wash. 596, 64 Pac. Rep. 844, 846, 85 Am. St. Rep. 966.

[8] Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174.

See § 34, ante.

[9] **Kerr's Cyc. Code Civ. Proc., § 1191.**

[10] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 116, 65 Pac. Rep. 329.

Washington. Such lien given under direct contract with owner: Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 138, 421.

[11] See §§ 61 et seq., §§ 66, 77, 104, ante, and §§ 259 et seq., §§ 269 et seq., §§ 286 et seq., §§ 315 et seq., post.

ments," in section eleven hundred and eighty-eight of the same code, referring to claims upon two or more " buildings, mining claims, or other improvements," do not mean the labor itself, or that particular class of labor for which the claimant was employed, but the objects enumerated upon which the labor has been performed,[12] and will be discussed hereafter.[13]

§ 142. Structures, and grading and other work, under § 1191. Section eleven hundred and eighty-three of the Code of Civil Procedure does not, by its terms, expressly relate to contracts for building sidewalks in cities, provided for by section eleven hundred and ninety-one, and the court was unwilling to construe section eleven hundred and eighty-three as applying to any contract not clearly within its letter as well as within its reason.[14] And the same reasoning would seem to be equally applicable to all other work mentioned in section eleven hundred and ninety-one, except, perhaps, the " improving " of the lot, which will be discussed hereafter.[15]

§ 143. Structures. Liens allowed. Under the first clause of section eleven hundred and eighty-three of the Code of Civil Procedure, and statutes having a similar clause, besides the common lien for construction, liens have been allowed for painting,[16] papering,[17] plumbing,[18] and for moving building

[12] Davis v. MacDonough, 109 Cal. 547, 551, 42 Pac. Rep. 450.

[13] See " Object on Which Labor must be Performed," §§ 166 et seq., post.

[14] Kreuzberger v. Wingfield, 96 Cal. 251, 257, 31 Pac. Rep. 109.

[15] See " Object on Which Labor must be Performed," §§ 166 et seq., post.

[16] **To contractors:** Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932; Harlan v. Stufflebeem, 87 Cal. 508, 510, 25 Pac. Rep. 686; Baird v. Peall, 92 Cal. 235, 237, 28 Pac. Rep. 285 (for materials furnished also); Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 338, 31 Pac. Rep. 164 (materials furnished).

To subcontractors: Hagman v. Williams, 88 Cal. 146, 147, 25 Pac. Rep. 1111 (materials furnished); Slight v. Patton, 96 Cal. 384, 385, 31 Pac. Rep. 248 (materials furnished). See Downing v. Graves, 55 Cal. 544, 545.

Oregon. Justice v. Elwert, 28 Oreg. 460, 43 Pac. Rep. 649.

[17] **To contractors:** Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932 (materials furnished); La Grill v. Mallard, 90 Cal. 373, 376, 27 Pac. Rep. 294 (and for materials furnished).

Montana. Marsh v. Morgan, 18 Mont. 19, 44 Pac. Rep. 85.

[18] McIntyre v. Trautner, 63 Cal. 429.

from one place to another.[19] It also appears to have been assumed that a lien might be allowed for the labor of a civil engineer.[20] The contractor's teamster, under a void contract,

Relation between gas-fitting and plumbing: See Newell v. Brill, 2 Cal. App. 61, 62, 83 Pac. Rep. 76.

Montana. Gould v. Barnard, 14 Mont. 335, 36 Pac. Rep. 317.

Oregon. But connecting bar with water-pipes and sewer (the work being on mere trade-fixtures), at the instance of tenant, does not give lien upon the property: Patterson v. Gallagher, 25 Oreg. 227, 35 Pac. Rep. 454, 42 Am. St. Rep. 794.

[19] **To contractors:** Palmer v. Lavigne, 104 Cal. 30, 37 Pac. Rep. 775. See Selden v. Meeks, 17 Cal. 128, 132.

Oregon. On the same lot (also raising the building), it being in furtherance of a general plan for the alteration and repair of the building: Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54 (under Hill's Code, § 3669).

Foreman of laborers moving house not allowed a lien: Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54.

Overseer who performed manual labor allowed a lien: Willamette Falls Co. v. Remick, 1 Oreg. 169 (1851); and it was intimated that such lien would be allowed, even if no such labor had been performed: Allen v. Elwert, supra.

[20] Green v. Jackson W. Co., 10 Cal. 374. The lien was not granted in this case, however, because suit was not begun in time, under act of 1855, § 1, which differed from the present statute, among other things, in that the labor was required to be performed "for" the construction or repairing of any building, etc.; whereas, at present, the labor must be "upon" the building: See Palmer v. Lavigne, 104 Cal. 30, 37 Pac. Rep. 775.

Colorado. A superintendent of construction employed by a contractor is entitled to a lien, under Mills's Ann. Stats., Rev. Sup., p. 769, for superintending the work of construction, with power to direct the work, but is not entitled to a lien for "going to different places, and running around, punching up people who had contracted to furnish material," as it was not superintending the work of construction, or otherwise within the classes of services enumerated in the statute: Pitschke v. Pope, 20 Colo. App. 328, 78 Pac. Rep. 1077.

Montana. Managing agent of a railroad company, who had various positions or duties in carrying on and conducting the business, including those of managing, conducting, and operating a railroad, in doing which the person ran as conductor, worked on the railroad track, helped around the round-house, and was a "general utility man," was held entitled to a lien for his services: Gilchrist v. Helena H. S. & S. R. Co., 58 Fed. Rep. 708, 716, **following** Flagstaff S. M. Co. v. Cullins, 104 U. S. 176, bk. 26 L. ed. 704.

General agent, manager, and superintendent of a corporation at fixed monthly salary, in the erection of buildings and working a mine, but who performs no manual labor upon the buildings or in the mines, is not entitled to a mechanic's lien for the value of his services: Smallhouse v. Kentucky & M. G. & S. M. Co., 2 Mont. Ter. 443, **distinguished** in Flagstaff S. M. Co. v. Cullins, 104 U. S. 176, bk. 26 L. ed. 704.

General manager of trains in the running, who at times acted as conductor of the cars, fired the engines and run them, helped to clean the engines and to repair the track, in short, took a hand in any capacity in which his services might be needed, was held entitled to a lien for his services: Gilchrist v. Helena H. S. & S. R. Co., supra.

was allowed a lien for hauling material to be used in the construction of a building.[21]

§ 144. "Construction, alteration, addition to, or repair." [22] It seems that the labor, as distinguished from the material furnished, need not be for the "construction, alteration, addition to, or repair" of the building or "structures" enumerated in the first clause of section eleven hundred and eighty-three of the Code of Civil Procedure. It is sufficient if the labor be done upon any of these objects, or in a mining claim or claims, or in or upon any real property worked as a mine, whether technically coming within the definition of "construction, alteration, addition to, or repair," or not. Manifestly, the preposition "upon," in the first clause of section eleven hundred and eighty-three, refers to and has for its object the noun "building." [23]

New Mexico. "Bodily toil in the form of manual labor upon the thing being constructed is not in all cases necessary to entitle one to a lien": Johnson v. McClure, 10 N. M. 506, 62 Pac. Rep. 983.

Drawing plans and specifications by architect, and superintending construction: See "Architects," §§ 119-129, ante; also 7 Am. & Eng. Ann. Cas. 617.

A general manager of a mining company, who attended to all its business of every kind, including mines, mill, boarding-house, ore-hauling, etc., and had nothing to do with the actual mining in the mine, except in the most general and indirect manner, having foremen under his direction, who superintended the men doing the actual mining, is not entitled to a lien, under a statute giving a lien to one "who performs labor in any mining claim": Boyle v. Mountain Key M. Co., 9 N. M. 237, 50 Pac. Rep. 347; Johnson v. McClure, 10 N. M. 506, 62 Pac. Rep. 983.

Utah. Overseer and foreman of a gang of men working on a mine, who also performs manual labor on the mine, is entitled to a lien for his services, under the Utah statute: Flagstaff S. M. Co. v. Cullins, 104 U. S. 176, bk. 26 L. ed. 704.

[21] McClain v. Hutton, 131 Cal. 132, 138, 63 Pac. Rep. 182, 623, 61 Id. 273.

See also § 46, ante.

[22] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[23] Palmer v. Lavigne, 104 Cal. 30, 31, 37 Pac. Rep. 775. See Williams v. Santa Clara M. Assoc., 66 Cal. 193, 197, 5 Pac. Rep. 85, 4 West Coast Rep. 616.

In Palmer v. Lavigne, supra, it was said, in arguendo, that the "labor for which the lien is given must be performed in the 'construction, alteration, addition to, or repair' of these objects, or one of them." The question was not involved, however, and the Williams case was not noticed. But see Davis v. MacDonough, 109 Cal. 547, 551, 42 Pac. Rep. 450.

Where a contractor performed labor upon a house, by moving it from one place to another, it was held that he was entitled to a lien therefor: Palmer v. Lavigne, 104 Cal. 30, 32, 37 Pac. Rep. 775. This

Counters and partitions added to a building as fixtures may amount to a " repair " thereof, and support a lien.[24]

§ 145. **Same. Importance of determination.** The determination of the question whether the work is the " construction, alteration, addition to, or repair " of a structure, under section eleven hundred and eighty-three of the Code of Civil Procedure, has particular reference to the lien for materials.

§ 146. **Character of alteration.** The " alteration " of a building may not necessarily be as to its framework, or a change in its form or structure. If the " alteration " is such as to adapt it to other than its original uses, it is sufficient to entitle to a lien. Thus where machinery was furnished to be used, and was used, as a part of a building, to convert it into a sugar-refinery, a lien was given, on the theory that the work done had been the " construction or repairing " of the building.[25]

§ 147. **Distinction between " alteration " and " repair."** There is a distinction between the " alteration " and " repair " of an old building and the " erection " of a new one. The distinction would seem to depend upon the facts of the particular case and the degree of change in the old structure. Thus, raising up, moving back, and repairing two houses, and furnishing materials therefor, do not constitute the " erection " of a building.[26]

case, however, does not decide that such "moving" comes within the definition of "construction, alteration, addition to, or repair"; but that it is the performance of labor upon a building: See Selden v. Meeks, 17 Cal. 128, 132.

Colorado. The nature of the labor must fall within the purview of the act (construction, extension, enlargement, alteration, or repair of a canal) : Arkansas River L. R. & C. Co. v. Nelson, 4 Colo. App. 438, 36 Pac. Rep. 307 (1883).

[24] Madary v. Smartt, 1 Cal. App. 498, 500, 82 Pac. Rep. 561.

[25] Donahue v. Cromartie, 21 Cal. 80, 86.

See "Contract for Sale, or for Labor," § 83, ante.

Act of April 19, 1856, § 1, under which this case was decided, gave material-men a lien for materials furnished "for the construction or repairing of any building, wharf, or other superstructure": See Goss v. Helbing, 77 Cal. 190, 191.

[26] Eaton v. Malatesta, 92 Cal. 75, 28 Pac. Rep. 54. See Ward v. Crane, 118 Cal. 676, 678, 50 Pac. Rep. 839.

See also § 93, ante.

Oregon. See Allen v. Elwert, 29 Oreg. 428, 442.

§ 148. Same. Alteration. Erection. On the other hand, where the southeast and west sides of an old house are torn away and an addition ten feet wide put up on the south side, and the roof of the old part was removed and a new one added over the old part, and the addition and all the partitions were new, although the flooring was not taken up, and the building was enlarged and raised up by putting in underpinning, it being an old building remodeled, it was held that the work was for the "erection" of the building.[27]

§ 149. Work in mines and mining claims.[28] Second clause. There seems to be fewer limitations upon the character of the work done under the second clause of section eleven hundred and eighty-three of the Code of Civil Procedure, than under the first clause, so long as it is labor performed "in" a mining claim,[29] or "in or upon" any real

[27] Ward v. Crane, 118 Cal. 676, 677, 50 Pac. Rep. 839.

[28] **Idaho.** Labor done "in or upon" a mining claim: See Lockhart v. Rollins, 2 Idaho 540, 21 Pac. Rep. 413, 415.

[29] See notes to §§ 144 et seq., ante, and §§ 161 et seq., post, and "Object on Which Labor must be Performed," §§ 166 et seq., post.

How far labor may be performed "in" a mining claim, for which in no event a lien is given, within the principle of McCormick v. Los Angeles City W. Co., 40 Cal. 185, 187, decided under a statute of different phraseology, has not been determined in California.

Cooking in a mining claim, as to lien for, see § 162, post.

Arizona. Definitions of "roasting," "melting," and "smelting" of ores: See United States v. United Verde C. Co. (Ariz.), 71 Pac. Rep. 954.

Colorado. But see Brainard v. McKenzie, 4 Colo. 251 (1872), where no lien was allowed for hauling ores from the mine to the mill, as it was not labor "in or upon" the mine.

Nevada. But a lien was allowed for such hauling as is mentioned in the Colorado note, supra: In re Hope Mining Co., 1 Sawy. 710, 12 Fed. Cas., p. 487. See Gould v. Wise, 18 Nev. 253, 3 Pac. Rep. 30.

No lien was allowed laborers on mines prior to the act of 1867: Hunter v. Savage Consol. S. M. Co., 4 Nev. 153.

Oregon. See act to secure liens for laborers in mining claims, approved February 20, 1891 (2 Hill's Ann. Laws, p. 1906).

The term "any such mine," in the third clause of § 1 of this act, refers to the mines mentioned in the sections preceding. "That is: 1. To a mine that is being operated for the purpose of obtaining metals or minerals, — or mining proper; 2. To labor or materials furnished in searching for metals or minerals in any designated tract that is supposed to contain them, — or prospecting. Mining and prospecting are generic terms, which include the whole mode of obtaining metals and minerals, and the lien is given to every person who shall do work or furnish materials, either in mining or prospecting," etc.: Williams v. Toledo C. Co., 25 Oreg. 426, 36 Pac. Rep. 159, 42 Am. St. Rep. 799.

property worked as a mine,[30] in the course of the actual work of mining or development in the mine.[31]

§ 150. **Same. Liens allowed.** Liens have been allowed for repairing machinery and tools on a mine;[32] for breaking down and tearing away from the face of the drifts in a mine the quartz and substance of the mine;[33] for work of superintending a mine when accompanied by manual labor;[34] for

Lien for constructing wagon-road. No lien is provided under this act for constructing a wagon-road, which is not "an incline or excavation": Williams v. Toledo C. Co., supra.

[30] This clause was added by the amendment of 1903, which evidently carries out but imperfectly the intention of the framers, and rather adds confusion to what already was uncertain.

[31] Williams v. Hawley, 144 Cal. 97, 103, 77 Pac. Rep. 762.

[32] **To laborer:** Malone v. Big Flat G. M. Co., 76 Cal. 578, 580, 18 Pac. Rep. 772.

Idaho. An amalgamator, who keeps the machinery in running order, looks after the concentrates, cleans amalgam, and generally looks after the machinery, has been held entitled to a lien: Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 74 Pac. Rep. 958 (a well-considered opinion, reviewing authorities from other states). And see Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632.

New Mexico. "Repair" of machinery: See Ripley v. Cochiti G. M. Co. (N. M.), 76 Pac. Rep. 285.

[33] Chappius v. Blankman, 128 Cal. 362, 365, 60 Pac. Rep. 925. See Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 333, 80 Pac. Rep. 74.

[34] Palmer v. Uncas M. Co., 70 Cal. 614, 616, 11 Pac. Rep. 666. Although the claimant was called a "superintendent," the service for which his claim of lien was filed was manual labor done by him in and upon the property. Whether a mining superintendent who does no manual labor is, under the statute, entitled to a lien was not decided.

Colorado. Rara Avis G. & S. Co. v. Bouscher, 9 Colo. 385, 12 Pac. Rep. 433 (but not for labor as disbursing agent and accountant).

Superintending construction, lien allowed for: Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. Rep. 303.

Professional services on a mine were required to be done for the working, preservation, or development of the property, under act of 1893, p. 315 (3 Mills's Ann. Stats., §§ 2867 et seq.): Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403.

Geologist and mining expert, who contracted to explore and examine certain mines and surrounding country with reference to their mineral and geological character, to enable the owner to sell the property, was held not entitled to a lien, under lien law of 1893, § 1, p. 315 (3 Mills's Ann. Stats., § 2867), allowing a lien to engineers who have rendered professional services, § 8 allowing such lien to all persons who did work for the working or development of any mining claim, or for such services in searching for metals or minerals, there being nothing upon the record nor upon the ground to indicate the work for which such latent lien might be claimed. A contrary ruling would be destructive of the business of selling mines: Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403.

grading a flume-bed, surface-ditches, and tunnel-approaches, and timbering and lining the same with masonry.[35] Liens are allowed to laborers in extracting ores from mines,[36] as well as for work done for development to discover new or better ore, or to facilitate the extraction of ore, discovered or undiscovered, or for work which served to accomplish all these purposes.[37]

Custodian to see that mining property is not destroyed is probably not "work," within the lien statute, even under the amendment of 1889, as mining property is not preserved by being watched, and the mere custodian of machinery on a mine might possibly have a lien on the machinery, but probably not on the realty (dictum): Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809.

As to custodian of mine not being entitled to mechanic's lien for services, see **Kerr's Cyc. Code Civ. Proc.,** § 143, note pars. 148, 149. See also note 44, this chapter.

Idaho. Professional or supervisory employment on mine: See Lockhart v. Rollins, 2 Idaho 540, 21 Pac. Rep. 413, 415.

Montana. Superintendent of mining corporation not allowed a lien: Smallhouse v. Kentucky etc. Co., 2 Mont. 443.

Nevada. Foreman who keeps time and gives orders for pay of men is entitled to a lien, as such work has a direct tendency to develop the property: Capron v. Strout, 11 Nev. 304.

New Mexico. General manager, superintendent, and mining engineer, who also received and shipped the bullion and concentrates, kept books, assisted in cleaning up, and retorted the gold, etc., did not "perform labor" in the mine, entitling him to a lien, his salary of three thousand dollars per annum being considered excessive for merely overseeing a few men in a small mine: Boyle v. Mountain Key M. Co., 9 N. M. 237, 50 Pac. Rep. 347.

"Mining superintendent," the superintendent of a mining company, distinguished from the "superintendent of a mine" only: Boyle v. Mountain Key M. Co., 9 N. M. 237, 50 Pac. Rep. 347, 349, 351.

Utah. Superintendent of labor in a mine was allowed a lien: Cullins v. Flagstaff S. M. Co., 2 Utah 219, **following Nevada case,** supra, and **distinguishing Montana case,** supra, as relating to the claim of "a general manager of a corporation in all its business." This case was affirmed in Flagstaff S. M. Co. v. Cullins, 104 U. S. 176, bk. 26 L. ed. 704, and the other cases here cited were reviewed, the court alluding to the presence of bodily toil, and saying, "It is somewhat difficult to draw the line between the kind of work and labor which is entitled to a lien, and that which is merely professional or supervisory employment not fairly to be included in these terms."

Washington. See Cadwell v. Brackett, 2 Wash. 321, 26 Pac. Rep. 219.

[35] Giant P. Co. v. San Diego F. Co., 88 Cal. 20, 22, 25 Pac. Rep. 976.

[36] Higgins v. Carlotta G. M. Co., 148 Cal. 700, 702, 84 Pac. Rep. 758, 113 Am. St. Rep. 344.

[37] Higgins v. Carlotta G. M. Co., 148 Cal. 700, 702, 84 Pac. Rep. 758, 113 Am. St. Rep. 344.

Lien allowed for sharpening picks, etc., and upon fixtures in mine: Malone v. Big Flat G. M. Co., 76 Cal. 578, 583, 18 Pac. Rep. 772.

See "Fixtures," § 95, ante, and §§ 185 et seq., post.

Construction, alteration, or repair of mine. Strictly speaking, a "mining claim" cannot be "constructed, altered, or repaired,"[38] although it has been more recently held that breaking down and tearing away from the face of the drifts in a mine the quartz and substance of the mine is work performed in the "construction, alteration, and repair" of the mine.[39]

§ 151. Same. Notice of non-responsibility. Tunnel. Before the amendment of March 18, 1907, section eleven

Work as a miner in the development, improvement, protection, and preservation of a mine: See Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 289, 65 Pac. Rep. 578.

Idaho. Lien allowed for milling ore in mill on mine: Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 74 Pac. Rep. 958.

[38] Helm v. Chapman, 66 Cal. 291, 292, 5 Pac. Rep. 352; Williams v. Santa Clara M. Assoc., 66 Cal. 193, 197; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 141, 34 Pac. Rep. 702, 36 Id. 388.

See "Nature of Property for Which Material must be Furnished," § 98, ante.

When the cases of Helm v. Chapman and Williams v. Santa Clara M. Assoc., supra, were decided, § 1183 of the Code of Civil Procedure provided, "Mechanics . . . performing labor upon or furnishing material to be used in the construction, alteration, or repair of any mining claim, building, wharf, . . . shall have a lien upon the property upon which they have bestowed labor," etc. In the former case it was said: "The intention of the law-makers seems to have been to give a lien upon the whole claim for labor performed on, and for materials furnished for and used in, any structure, or on or in the alteration or repair of any structure, or on or in a mining claim." Shortly after this decision, this section was amended by striking out from the list of "structures," in the first clause, the words "mining claim," and a separate clause, herein generally designated as "the second clause of § 1183," was inserted, providing that "any person who performs labor in any mining claim or claims" has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims," etc. The words quoted were in the section before 1880, and were stricken out at that time, labor upon any mining claim being also provided for in the first clause.

In Ayers v. Green Gold Mining Co., 116 Cal. 333, 48 Pac. Rep. 221, an attempt was made to foreclose a lien for the work of cleaning out a tunnel, but none of the questions discussed above were noticed. Under the first clause of the statute, a miner is given a lien upon property for work on "structures." The extent of this property is more particularly defined in § 1185 of the Code of Civil Procedure. Under the second clause, "any person who performs labor in any mining claim or claims, or in or upon real property worked as a mine," whether technically a "miner" or not, "has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, or real property so worked as a mine."

[39] Chappius v. Blankman, 128 Cal. 362, 365, 60 Pac. Rep. 925.

hundred and ninety-two of the Code of Civil Procedure provided for notice of non-responsibility by the owner "within three days after he shall have obtained knowledge of the construction, alteration, or repair" of "every building or other improvement mentioned in section eleven hundred and eighty-three," "or the intended construction, alteration, or repair." Under this section, as it then stood, drifting in a tunnel was not the "construction, alteration, or repair" of any such "building or other improvement," and such work differs from running a tunnel, the court saying, "It is equitable to require the owner, who sees going forward an unauthorized building or other beneficial improvement upon his property, to give notice that he will not be responsible therefor; but this consideration fails when the work consists in a subtractive process — the removal of the very corpus of the property." [40] In view of the amendment to the section, the decision loses force.

§ 152. Same. Drifting. But, while, under the peculiar language of section eleven hundred and ninety-two of the Code of Civil Procedure, as it stood before the amendment of 1907, "drifting in a tunnel" might not have been the "construction, alteration, or repair of a building or other improvement" for the purpose of requiring notice of non-responsibility from the owner to prevent his liability from attaching for the work when ordered by a person not duly authorized, yet a lien was given "in a mining claim, or in or upon any real property worked as a mine," under the express amendment of section eleven hundred and eighty-three in 1903, whether the work be in the development thereof or in working thereon by subtractive process; and it had been previously held that for work performed in

[40] Jurgensen v. Diller, 114 Cal. 491, 493, 46 Pac. Rep. 610, 55 Am. St. Rep. 83.

See "Estoppel," § 469, post. But see "Notice of Non-responsibility," §§ 473 et seq., post.

In Williams v. Mountaineer G. M. Co., 102 Cal. 134, 139, 34 Pac. Rep. 702, 36 Id. 388, it was said: "The labor cannot generally be said to have contributed to the creation of the property, or added to its value: on the contrary, it may diminish its value — perhaps render it valueless."

quarrying and extracting quartz and ores in stopes and levels, for the purpose of taking out rock to be crushed, or in any pit, shaft, or gallery of a mine, one is entitled to a lien.[41]

§ 153. Same. Running tunnel. The work of constructing or running a tunnel in a mine is work done upon the mining claim in the development thereof, within the mechanic's-lien law. Hence where a mining company contracted for the running or construction of a tunnel in their mining claim for a stipulated sum, and the contractor failed to pay the laborers employed in running or constructing such tunnel, they were held to be entitled to a mechanic's lien on the property for the amount due them as wages for the work.[42]

§ 154. Same. Shaft. Mining instrumentalities. The true signification of such expressions as "shafts," "tunnels," "levels," "chutes," "stopes," "uprises," "crosscuts," "inclines," etc., when applied to mines, is instrumentalities whereby and through which such mines are opened, developed, prospected, improved, and worked. He who engages in the construction of those prime requisites upon or in a mine is engaged in mining, equally with one who extracts gravel or ore therefrom, and is entitled to a lien therefor.[43]

§ 155. Same. Watchman of idle mine. A lien was refused to a watchman of a mine while the mine was lying idle.[44]

[41] Helm v. Chapman, 66 Cal. 291, 292, 5 Pac. Rep. 352, 5 West Coast Rep. 127.

[42] Parker v. Savage Placer M. Co., 61 Cal. 348. At the time of this decision, § 1183 of the Code of Civil Procedure provided that "mechanics . . . performing labor upon or furnishing material to be used in the construction, alteration, or repair of any mining claim, building, . . . tunnel, . . . or other structure shall have a lien upon the property," etc. It is also to be noticed that "tunnels" were specifically enumerated in the section; and whether the lien was allowed as work on a "tunnel" or in a "mining claim" does not clearly appear in the decision.

See § 179, post.

[43] Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

ee **Martin's Mining Law,** passim.

Williams v. Hawley, 144 Cal. 97, 103, 77 Pac. Rep. 762.

See also note 34, ante, this chapter.

§ 156. Grading, etc., under § 1191.[45] Section eleven hundred and ninety-one of the Code of Civil Procedure applies to grading and other improvements of a lot, done independently of and not as a necessary part of the construction of a building,[46] in an incorporated city or town,[47] and not outside of it.[48]

§ 157. Same. Work not enforceable under this section. The lien of excavators who perform labor and furnish materials for the proper grading of a lot preparatory and necessary to the construction of a building, under a void original contract, which included such preparatory work, is enforceable, under section eleven hundred and eighty-three, and not under section eleven hundred and ninety-one, of the Code of Civil Procedure.[49] It is thus fairly deducible that where the work would otherwise fall within section eleven hundred and ninety-one, if it is preparatory and necessary to any work falling within section eleven hundred and eighty-three, it becomes a part of the latter work, and is generally governed by the same rules as such work.

§ 158. Same. Meaning of "improves," "improvement." The word "improves," as used in section eleven hundred and ninety-one, is different in meaning from that used in section

Idaho. A watchman in charge of mining property, consisting of personal and real property, has a lien on the personal property while in possession thereof, for his services: Idaho Comstock M. & M. Co v. Lundstrum, 9 Idaho 257, 74 Pac. Rep. 975 (under Rev. Stats. 1887, § 3445).

Foreman and watchman of a mine held entitled to a lien, under Laws 1893, p. 49, § 1: Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 59 C. C. A. 200.

[45] Section 9 of the act of 1868 (Stats. 1867-68, p. 589) gave a lien similar to that provided for in § 1191 of the Code of Civil Procedure, and the section was carried into the Code of Civil Procedure upon its adoption in 1872, and became § 1184. It remained unchanged until 1885 (Stats. 1885, p. 143), when it became § 1191 of the Code of Civil Procedure, and was amended by adding the words "or sidewalk" after the word "street." By the act of 1887, four sections of the code. relating to mechanics' liens, including § 1191, were amended, leaving the other sections untouched: Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 117, 65 Pac. Rep. 329.

[46] Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

[47] See "Object on Which Labor must be Performed," §§ 166 et seq., post.

[48] Durrell v. Dooner, 119 Cal. 411, 51 Pac. Rep. 628.

[49] Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

eleven hundred and eighty-three, discussed above.[50] It refers to some "improvement of" the lot upon which the lien is given, rather than to the "improvements upon" the lot, referred to in section eleven hundred and eighty-eight, relating to a lien upon two or more buildings; or in other words, it refers to the work, rather than to the object upon which the work is done. Section eleven hundred and ninety-one governs the construction of sidewalks.[51]

§ 159. Same. Relation to work on structures. Under the decision last cited, it seems that section eleven hundred and eighty-three has no application generally to the work specially mentioned in section eleven hundred and ninety-one, which gives a lien to a person who "grades . . . or otherwise improves any lot in any incorporated city," etc. A person who erects a "structure" on a lot in an incorporated city may have a lien which would fall within the first clause of section eleven hundred and eighty-three, and he would, unquestionably, in the usual acceptation of the term, improve the lot, and make improvements in connection therewith.[52]

[50] See § 141, ante, and § 171, post.

[51] Kreuzberger v. Wingfield, 96 Cal. 251, 257, 31 Pac. Rep. 109.

Washington. The grading of a street in front of property is an "improvement" of the property: Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 138, 421.

[52] Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986.

"Therewith." It is uncertain whether the word "therewith," as used in this connection, alludes to the lot, sidewalk, rooms under a sidewalk, street, areas, vaults, or cellars, or all of these objects. It is possible that § 1191 alludes to some kind of "improving" of a lot, in incorporated cities, of a character not referred to in § 1183. The "improvements," under the first clause of § 1183, are classified as "structures." The nature of the work enumerated in § 1191 is of a different general character from that mentioned in § 1183, and the expression, "makes any improvement in connection therewith," would probably be construed as the doing of any work of the same general character as that specifically enumerated in § 1191 (under the principle de sociis), and not provided for in § 1183. But see §§ 156, 157, ante, and McClain v. Hutton, 131 Cal. 132, 136, 63 Pac. Rep. 182, 61 Id. 273, and see "Object on Which Labor must be Performed," §§ 166 et seq., post.

Washington. The lien for grading the street in front of a lot is given, and attaches in the same manner and to the same extent as where the improvement is placed directly on the lot, instead of appurtenant to it: Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 138, 421.

§ 160. **Same. Liens allowed.** Under section eleven hundred and ninety-one of the Code of Civil Procedure, liens have been allowed for street improvements in front of the property,[53] for grading the lot,[54] and for constructing bulkheads,[55] sidewalks,[56] curbing, and cement steps on the sidewalk leading up to the pathways.[57]

§ 161. **Labor for which lien is not given in any event.** The work must not be too remote from the ultimate result contemplated,[58] even though without such work the ultimate result could not be accomplished.

§ 162. **Same. Preliminary work.** Thus no lien was allowed for "preliminary work," consisting of the building of sawmills, railroads, and roads, including a plant, timber-

[53] Beatty v. Mills, 113 Cal. 312, 45 Pac. Rep. 468. See Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174, and Santa Barbara v. Huse, 51 Cal. 217 (improvements under a city ordinance). See also De Haven v. McAuley, 138 Cal. 573, 576, 72 Pac. Rep. 152.

The permission of the superintendent of streets, under an ordinance of the city and county of San Francisco, was sufficient to justify digging up and disturbing the street for the purpose of paving: Flinn v. Mowry, 131 Cal. 481, 488, 63 Pac. Rep. 724, 1006; but not grading the same: Flinn v. Mowry, supra; San Francisco v. Buckman, 111 Cal. 25, 43 Pac. Rep. 396.

In the case of grading under private contract, under subdivision 10 of § 7 of the Street Improvement Act (Stats. 1885, p. 147, as amended Stats. 1891, p. 201. **Henning's General Laws,** p. 1318), permission of the city council to do the work must be first obtained: Flinn v. Mowry, supra; Durrell v. Dooner, 119 Cal. 411, 51 Pac. Rep. 628. See Flinn v. Mowry, 131 Cal. 481, 487, 63 Pac. Rep. 724, 1006 (also paving).

[54] Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986. See Giant P. Co. v. San Diego F. Co., 88 Cal. 20, 22, 25 Pac. Rep. 976.

Oregon. Under § 3676, Hill's Code: See Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305.

[55] Kreuzberger v. Wingfield, 96 Cal. 251, 253, 31 Pac. Rep. 109.

See "Grading and Street-work," § 184, post.

[56] Kreuzberger v. Wingfield, 96 Cal. 251, 253, 31 Pac. Rep. 109; Bryan v. Abbott, 131 Cal. 222, 63 Pac. Rep. 363 (cement sidewalk; for materials also).

[57] Bryan v. Abbott, 131 Cal. 222, 63 Pac. Rep. 363. See also Flinn v. Mowry, 131 Cal. 481, 487, 63 Pac. Rep. 724, 1006.

Colorado. A lien on lots for constructing a sidewalk, not on the land, but in the street in front thereof, is not authorized by 2 Mills's Ann. Stats., § 2867, and said section is not modified by § 2871, Id.: Fleming v. Prudential Ins. Co., 19 Colo. App. 126, 73 Pac. Rep. 752.

[58] **Colorado.** Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403; Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. Rep. 433.

slides, and other apparatus; and in the construction of a ditch.[59]

Nor for cooking on the ground, as the work progressed, in the construction of a reservoir on a mine, the court saying, "If any lien exists, it arises, not from the place where the cooking was done, but from the nature of the services, and its relation to the work which was being constructed. If the plaintiff can assert a lien on the facts proved, he could as well have done so if the cooking had been performed at any other place; and if the mere fact that a person is employed to cook for the laborers engaged in erecting a building entitled him to a lien, the same result would follow if he had furnished the provisions also. On the same theory, a blacksmith who shod the horses, or a grain dealer who furnished them forage whilst employed on the work, or a wagon-maker who repaired the carts of the contractor, would be entitled to a lien on the building. And if every one who contributed indirectly and remotely to the work is entitled to a lien, no reason is perceived why a surgeon called to set a broken limb of one of the laborers, whereby he will be enabled at an early day to resume work on the building, might not assert a lien; but services of this character, not performed on the building, are not within the province of the statute." [60]

[59] South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, bk. 18 L. ed. 894.

[60] McCormick v. Los Angeles W. Co., 40 Cal. 185, 187. This case was decided under the act of March 30, 1868 (Stats. 1867-68, pp. 589, 590), § 1, providing that "every mechanic, artisan, machinist, builder, contractor, lumber merchant, miner, laborer, and other person performing labor upon or furnishing materials of any kind to be used in the construction, alteration, or repair, either in whole or in part, of any mining claim, building, . . . shall have a lien upon the same for the work or labor done or materials furnished." It will be noticed that the statute upon which this decision is based is not as broad as the second clause of § 1183, "in a mining claim."

As to lien of cook on mine for amount of wages, see **Kerr's Cyc. Code Civ. Proc.**, § 1183, note pars. 148, 149.

Colorado. Nor for services rendered in traveling about and urging the contractor's material-men to hasten delivery of materials, under Mills's Ann. Stats., Rev. Sup., p. 769: Pitschke v. Pope, 20 Colo. App. 328. See also Brainard v. McKenzie, 4 Colo. 251.

While liens are allowed for many kinds of labor that the authorities term "incidental," such incidental labor must be directly done for and connected with, or actually incorporated into, the building: Rara Avis G. & S. M. Co. v. Bouscher, 9 Colo. 385, 12 Pac. Rep. 433 (no lien allowed for disbursing agent and accountant).

Oregon. See Willamette Falls T. & M. Co. v. Remick, 1 Oreg. 169.

§ 163. Same. Teaming for material-man. Upon the principles set forth in the last section, no lien is given to material-men's laborers. Thus no lien is given to a teamster who hauls bricks [61] or slate [62] for a material-man.

§ 164. Same. Material-man's laborer. On the same principles as to remoteness from the ultimate object of the work and the nature of the labor for which a lien is given, heretofore discussed, no lien is allowed to the one making the material, e. g., bricks, for the material-man.[63]

§ 165. Same. Test, legitimate connection with work of mine. On the other hand, it was said that "the character of the work should not be scrutinized too strictly. If the labor had a legitimate connection with the working of the mine, it is sufficient, within the meaning of the lien law." [64]

[61] Adams v. Burbank, 103 Cal. 646, 651, 37 Pac. Rep. 640; Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 618, 25 Pac. Rep. 124.

But otherwise if the hauling was done for the original contractor, under a void statutory original contract: McClain v. Hutton, 131 Cal. 132, 138, 63 Pac. Rep. 182, 622, 61 Id. 273.

See §§ 91, 162, ante.

Oregon. By 2 Hill's Ann. Laws, § 3669, a lien is given for "transporting or hauling material . . . to be used in the construction," etc., of the objects mentioned in the section. But no lien was allowed thereunder for hauling or transporting tools and appliances for raising a house: Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54.

[62] Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. Rep. 1008 (it did not appear that the cost of cartage was included in the contract price).

[63] Adams v. Burbank, 103 Cal. 646, 651, 37 Pac. Rep. 640 (dictum). See ante, § 46.

[64] Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772 (decided under "the law as it stood in 1880." Note, however, that § 1183 was amended in 1880).

CHAPTER X.

OBJECT ON WHICH LABOR MUST BE PERFORMED.

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§ 166. Distinction between "object" and "property." A distinction must be drawn between the "object" upon which the work must be done in order to gain a lien, and the "property" to which the lien extends, which may be either rights or objects.

The "property" may be: 1. Physically, considerably greater in extent than the object; but, on the other hand, it may not include the object; or 2. It may be the fee-simple,

or an estate or interest less than the fee-simple. The latter matters will be considered hereafter.[1] Some confusion has arisen by reason of the failure to observe these distinctions. This subject is also closely related to the nature of the labor for which a lien is given, which has already been considered.[2]

§ 167. Constitutional provision. The constitution of California[3] provides that lien-holders "shall have a lien upon the 'property' upon which they have bestowed labor or furnished material."[4]

§ 168. Division of the statute. It has already been shown, in a general way, that there are three great divisions of the California statute, two of these divisions being contained in section eleven hundred and eighty-three of the Code of Civil Procedure, relating to "structures" and "mines," and one of them in section eleven hundred and ninety-one of the same code, relating to grading, etc., work on lots.[5]

§ 169. Statutory provisions. In obedience to the above-mentioned provision of the California constitution, the code provisions on mechanics' liens[6] relating to real property have assumed the present form. Section eleven hundred and eighty-three of the Code of Civil Procedure enumerates two sets of objects upon which the labor must be performed: 1. Under the first clause, upon any "building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon-road, or other structure," although the lien is given upon the "property" upon which they have bestowed labor or furnished the material; and 2. Under the second clause, "in any mining claim or claims, or in or upon

[1] See "Property Extent of Lien," §§ 438 et seq., post.
[2] See §§ 130-165, ante.
[3] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws**, p. civ.
[4] Berentz v. Belmont O. Co., 148 Cal. 577, 583, 84 Pac. Rep. 47, 113 Am. St. Rep. 308, **reversing** s. c. (Cal. App.) 84 Pac. Rep. 45.
[5] See §§ 130-134, ante.
[6] **Kerr's Cyc. Code Civ. Proc.**, §§ 1183-1203a.

any real property worked as a mine." [7] Section eleven hundred and ninety-one of the Code of Civil Procedure enumerates as the objects upon which the labor must be performed, "any lot in any incorporated city, or the street or sidewalk in front of or adjoining the same, or any areas, or vaults, or cellars, or rooms under the sidewalks," [8] and the lien is given upon the lot.

§ 170. Definition of terms used herein. In the discussion of this subject, the thing upon which the labor must be performed in order to gain a lien will be designated as the object of the labor, and the thing over which the lien extends will be designated as the property subject to the lien. The objects of the labor are given various generic designations in different sections of the code, the same being marked by uncertainty and indecision in their use.[9]

[7] **Under the act of April 19, 1856,** giving a lien, in the first section, for the work and labor, or materials furnished, for the construction or repairing of any building, wharf, or other superstructure, and in the tenth section for the making, altering, or repairing of personal property, and under the fourth section giving a lien upon the land, if at the time the land belonged to the person who caused the superstructure to be erected, the court said: "Putting these different provisions together, the evident intention of the act was to give mechanics and artisans a lien for all work done by them upon any description of property": McCreary v. Osborne, 9 Cal. 119, 123.

[8] See §§ 133, 134, 139, 156-160, ante.

[9] **§ 1183 of the Code of Civil Procedure** provides: "Mechanics . . . shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished, [1] whether at the instance of the owner, or of any other person acting by his authority or under liens, as contractor [1] or otherwise; and any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, . . . has a lien upon the same . . . for the work or labor done or materials furnished by each respectively, [2] whether done or furnished at the instance of the owner of such mining claim or claims or real property worked as a mine or of the building, or other improvement, or his agent [2]."

If the expression "building, or other improvement," in the clause set off and marked by the [2] in the above quotation, relates to "mining claim," among other objects, such "mining claim" would seem to be within the classification of "buildings" or "improvements"; if, on the other hand, it relates to "structures" only, under the clause set off and marked by the [1], it seems to be an unnecessary repetition of the first of the passages above set off as indicated. If the expression "building, or other improvement," in the second clause, is construed as relating to "mining claim," and as indicating the labor performed, which results in the "building or improvement," the second of the claims set off may be given some significance.

§ 171. Same. "Improvement." "Structure." The expressions "improvement" and "structure," as used in different sections of the statute, having meanings greater or less in

It is to be noted, in this connection, that the object may come into existence as an "improvement" or "building" by the exercise of labor upon the property; for instance, a structure erected upon a bare lot comes into existence as an object by the application of labor, and the "improvement" then exists. The performance of the work and the coming into existence of the object may be synchronous events, and may go on pari passu: Curtis v. Sestanovich, 26 Oreg. 107, 115, 37 Pac. Rep. 67; Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 34 Pac. Rep. 368.

The object or "improvement," in some instances, may be considered the result of the labor, or the final cause thereof. The California supreme court has said (dictum): "In all these sections [Code Civ. Proc., §§ 1183, 1184, 1185, 1187], — and others might be mentioned, — the term 'improvement' is evidently used as equivalent to the object upon which the labor has been performed, and it would be an unwarranted application of the term to construe it as equivalent to the labor itself, or to that particular class of labor for which the claimant was employed": Davis v. MacDonough, 109 Cal. 547, 551, 42 Pac. Rep. 450.

The clause following the passage from § 1183, above quoted, is as follows: "And every contractor, . . . or other person having charge of any mining, . . . or the construction, alteration, addition to, or repair, . . . of any building or other improvement, as aforesaid, . . . shall be held to be the agent of the owner for the purposes of this chapter." Here "mining" is set over against certain work and "any building or other improvement." The reference seems aimed rather at the work than at the object. "Mining," however, may be done either in a "mine" or in a "mining claim"; but it has been seen that the former expression is broader than the latter.

Work in a mine, upon land held under an agricultural patent, or in a Mexican or Spanish grant, it has been held, does not fall within the purview of the second clause of § 1183, as it stood before the amendment of 1903. Mining in a mining claim may therefore possibly be meant. And this may tend to show that a mining claim is not a "building or other improvement as aforesaid," within the meaning of the clause now discussed. In the case last cited, the court said: "In a subsequent portion of the same section [Code Civ. Proc., § 1183], these enumerated objects ["structures," under the first clause] are grouped into 'building or other improvement.'" It is uncertain to which of the two clauses quoted in this note the language of the supreme court has reference; but, at any rate, it tends to show that a "mining claim" is an object different from a "building or other improvement."

In § 1184, in the clause relating to posting notices of the performance of labor or the furnishing of materials, we find a requirement to post it "in a conspicuous place upon the mining claim or improvement"; again tending to show that a "mining claim" is not within the meaning of "improvement."

In § 1185 we find the expression, "building, improvement, well, or structure," used twice in reference to the "space" about the same "for the convenient use and occupation thereof"; which also seems, but not so clearly, to exclude "mining claims."

In § 1186 we find the expression, "building, improvement, or structure," used twice in reference to priority over other liens and

scope, in accordance with the context in which they are found; each of the expressions, "structures" or "improvements," is sufficiently extensive in meaning to include all the

encumbrances, but no reference made to mining claims. Quære, Does the former expression include the latter?

In § 1187 the expression, "building, improvement, or structure," is used nine times, once in contradistinction to "labor in a mining claim," in reference to notice of completion of the building, etc., and the filing of the claim of lien.

In § 1190 we find the expression, "building, mining claim, improvement, or structure," in reference to the statutes of limitations; again showing that "mining claim" is not included in the other objects enumerated.

In § 1192, however, we find the expression, "building or other improvement mentioned in § 1183 of this code," and the expression, "building or other improvement," relating to estoppel of the owner by failing to post notice of non-responsibility; and it has been assumed that this section has no application to mining claims.

In § 1188 we find the expression, "buildings, mining claims, or other improvements," in reference to the filing of a claim against two or more of such objects; and later in the same section the expression, "buildings or other improvements"; which would tend to show that the work done or accomplished in a mining claim is an "improvement."

In § 1196 we find, in reference to the attachment or execution, etc., of materials furnished for use in the construction, alteration, or repair of "any building or other improvement," that they are exempt, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such "building, mining claim, or other improvement"; again classing accomplished work on a mining claim with "other improvement."

"Improvement." No "hard-and-fast" definition. It seems that no hard-and-fast definition can be given to the expression "improvement" to make it descriptive of the object of the labor, at least so far as a mining claim is concerned. It is evident that a "structure" may be erected in a mining claim, or in or upon real property worked as a mine; but in such case it seems the work is to be regarded as done under the second clause of § 1183, and not upon a "structure" under the first clause of that section: See §§ 130 et seq., ante.

In reference to "structures" under the first clause of § 1183, the supreme court has said: "In a subsequent portion of the same section these enumerated objects are groupd into 'building or other improvement,' and in subsequent sections they are designated as 'building, improvement, or structures.' It is thus evident that the term 'improvement,' as used in § 1187, is intended to embrace the several enumerated objects in the beginning [first clause] of § 1183, other than 'building' and 'structure'": Davis v. MacDonough, 109 Cal. 547, 551, 42 Pac. Rep. 450.

It is to be noted, however, that in § 1183, as shown above, the expression, "building or other improvement," seems to include all the "structures," at least other than "building," mentioned in the first clause of § 1183, and hence includes "structures"; so that, in this connection, in certain clauses it seems that "improvement" includes "structures" other than "building." Likewise in §§ 1188, 1192, and 1196 of **Kerr's Cyc. Code Civ. Proc.**

objects enumerated in the first clause of section eleven hundred and eighty-three;[10] and in most instances they denote the accomplished work, that is, the object, and not the labor, but the result of the labor, whether under the first clause or under the second clause of section eleven hundred and eighty-three of the Code of Civil Procedure.[11]

§ 172. **Structure on a mine. Oil-well.** When any one of the "structures" enumerated in section eleven hundred and eighty-three[12] is an adjunct or appurtenance to a mining claim or mine, the effect is to transfer the object from the first to the second clause of the section.[13] The two clauses are not mutually exclusive. Hence a well drilled for the purpose of extracting mineral oil, in a tract of land, creates a mining claim or mine, notwithstanding the inclusion of "wells" in the enumeration of structures in the first clause.[14]

§ 173. **"Structures," in general. First clause of statute.** "The use of the phrase 'other structure,'" in the above-quoted extract (the first clause) of section eleven hundred and eighty-three, "shows that the word 'structure' comprehends all the properties specifically enumerated, and is broad

[10] See § 141, ante.

[11] **Amendment of 1897 to § 1187.** It is to be noted in this connection that under the amendment of 1897 to § 1187, relating to notice of completion of building, we find the expression, "construction, . . . of any work mentioned in § 1183 of this code." The word "work" apparently refers to the object or accomplished work enumerated in that section.

Colorado. See Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64 (1889).

[12] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[13] Berentz v. Belmont Oil Co., 148 Cal. 577, 581, 84 Pac. Rep. 47, 113 Am. St. Rep. 308, **reversing** s. c. (Cal. App.) 84 Pac. Rep. 45; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 Pac. Rep. 702, 36 Id. 388. See Parke & Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 492, 82 Pac. Rep. 51, and Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

[14] Berentz v. Belmont Oil Co., 148 Cal. 577, 583, 84 Pac. Rep. 47, 113 Am. St. Rep. 308.

See **Martin's Mining Law,** passim.

Oregon. Mill or tramway built and used in connection with a mine is a "structure," but a mine or mining claim is not a "structure": Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996 (under Hill's Ann. Laws, § 3669).

Washington. Lien on well, under § 1, p. 229, ch. cxvi, Laws 1905: Lee v. Kimball (Wash.), 88 Pac. Rep. 1121.

enough to include any similar thing constructed, should the enumeration prove incomplete. Following this with the language 'and any person who,' it would seem to show that a mining claim was not included in the structures upon which liens were allowed."[15] As shown above, the expression "structure," or "other structure," has been determined to have different significations, in accordance with the context. Thus:

A "mine" or pit sunk within a mining claim is a "structure," within the meaning of the statute providing for liens of mechanics and others upon real property.[16]

§ 174. Structures not enumerated in statute. Whether structures not enumerated in the statute carry a right to a mechanic's lien depends upon the nature of the structure, the character of its connection to the realty or an improvement thereon, and the uses for which it is intended. A structure may be a part of a larger structure, and, in reference to it, constitute but a part of a structure. In such case it is well settled that the lien must cover the entire structure, and not the specific addition.[17] Thus where a —

Boarding-house, and other improvements and structures, are put upon a mining claim, the material-man will have a

[15] Williams v. Mountaineer G. M. Co., 102 Cal. 134, 139, 34 Pac. Rep. 702, 36 Id. 388; Pacific Rolling M. Co. v. Bear Valley Irr. Co., 120 Cal. 94, 98, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

Oregon. Compare: Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470, 8 L. R. A. 700.

[16] Helm v. Chapman, 66 Cal. 291, 5 Pac. Rep. 352, 5 West Coast Rep. 127, **cited** in Pennsylvania Steel Co. v. J. E. Potts S. & L. Co., 63 Fed. Rep. 11, 14, 11 C. C. A. 11, 22 U. S. App. 537; Silvester v. Coe Quartz M. Co., 80 Cal. 510, 512, 22 Pac. Rep. 217; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 142, 34 Pac. Rep. 702, 36 Id. 388.

Oregon. See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996.

[17] Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 Pac. Rep. 702, 36 Id. 388. See Cox v. Western Pac. R. Co., 44 Cal. 28; Dickenson v. Bolyer, 55 Cal. 285; Silvester v. Coe Quartz M. Co., 80 Cal. 510, 22 Pac. Rep. 217.

Colorado. Structure: See Small v. Foley, 8 Colo. App. 135, 47 Pac. Rep. 64.

Georgia. Farmers' L. & T. Co. v. Candler, 87 Ga. 241, 13 S. E. Rep. 560.

Indiana. Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. Rep. 506.

Oregon seems to hold contrary to the general doctrine, and gives a lien on the specific structure in certain cases: See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994.

right to a lien on the mining claim, not upon the boarding-house.[18]

Ice-room, built in and attached to the structure of a warehouse in such a manner that it cannot be removed without being torn to pieces, becomes a part of the warehouse, and a material-man is entitled to a lien upon the warehouse for the materials furnished for such ice-room.[19]

Pipe line for an irrigation company assumed, but not decided, to be within provisions of mechanic's-lien law, and lien of material-man enforced.[20]

Poles set in ground, connected together by wire in the usual way for the transmission of electricity, for the purposes of light, heat, and power, are thought to constitute a "structure," within the provisions of the law providing a lien for mechanics, laborers, material-men, and others.[21]

Reduction-works erected upon a mine gives the material-man a right to a lien upon the entire mining claim for the materials furnished therefor.[22]

Whether materials affixed to building or structure so as to become a part thereof, is a question of fact to be determined by the trial court from the evidence before it: See Bianchi v. Hughes, 124 Cal. 24, 28, 56 Pac. Rep. 610; Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

[18] Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 Pac. Rep. 702, 36 Id. 388.

Oregon rule would give lien upon separate structure erected: See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994.

[19] Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

See § 189, post.

[20] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. Rep. 45.

See § 177, post.

[21] Forbes v. Willamette Falls Electric Co., 19 Oreg. 61, 23 Pac. Rep. 370 (Hill's Code, § 3669), **citing** Helm v. Chapman, 66 Cal. 291, 5 Pac. Rep. 352, 5 West Coast Rep. 127. And see Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470, 473, 8 L. R. A. 700, and Pennsylvania Steel Co. v. J. E. Potts S. & L. Co., 63 Fed. Rep. 11, 11 C. C. A. 11, 22 U. S. App. 537, considering the foregoing cases.

Telephone line. Mechanic's lien on. In Roebling Sons Co. v. Bear Valley Irr. Co., 99 Cal. 488, 34 Pac. Rep. 80, an attempt was made to enforce a mechanic's lien upon a telephone line; but it seems that no question was raised as to whether or not the land was subject to the lien, the evidence not showing whether the materials were purchased for that particular line.

[22] Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 Pac. Rep. 702, 36 Id. 388.

See further authorities in note 17, this chapter.

Oregon rule gives lien on separate structure: See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994.

Stamp-mill erected upon a mining claim is governed by the same rules as a reduction-works erected thereon.[23]

Swings, consisting of two upright posts in the ground and braced and connected at the top by cross-pieces with rings in them, and seats attached, are not "structures," within the meaning of the provision of the mechanic's-lien law.[24]

Tramway erected upon a mining claim, for use in connection with the work of operating the mine on said claim, is governed by the same rules as reduction-works and stamp-mills.[25]

§ 175. **Structures enumerated in statute. Buildings** being enumerated in the statute, other requisites necessary to entitle to a lien being present, the only question to be determined is, whether the improvement is such a building or structure as comes within the purview of the statute giving the right to a lien.[26] We have already referred to some buildings and structures not enumerated within the statute; but there are others, as:

Dance-hall, being a covered structure resting on sills, partly weather-boarded around the sides, without doors and windows, — quære, whether a "building," within the meaning of the statute; also, whether a "trade-fixture," under circumstances of the particular case.[27]

Church is a "building," within the meaning of the mechanic's-lien law, and is subject to the lien, not being exempt from execution.[28]

§ 176. **Same. Bridges** are expressly provided for in section eleven hundred and ninety-three of the Code of Civil Procedure. Under the act of 1850, which gave a lien upon buildings and wharves, it was held that a bridge did not come within the meaning of the statute.[29]

[23] See authorities in last note.

[24] Lothian v. Wood, 55 Cal. 159, 163.

[25] See authorities in note 22, this chapter.

[26] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1203a.

[27] Lothian v. Wood, 55 Cal. 159, 163.

Colorado. Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64 (1889).

[28] Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 160, 44 Pac. Rep. 390.

[29] Burt v. Washington, 3 Cal. 246.

§ 177. **Same. Aqueduct, ditch, and flume.** A lien is now given, under the first clause of section eleven hundred and eighty-three of the Code of Civil Procedure, for work upon a flume, and it is within the meaning of the phrase, "building, improvement, or structure," as used in section eleven hundred and eighty-seven of the same code, relating to the evidence of the completion of the same.[30] In an early case it was said: "The flumes constructed at different parts of the line cannot change the general character of the work as an excavation. These flumes were mere connecting links of the ditch, over ravines and gulches. As a ditch, then, the general work must be regarded, and, as such, the statute gives no lien upon it for labor bestowed, or materials furnished, in its construction. The language of the statute is, 'building, wharf, or other superstructure.' A ditch, of course, is not a building, or a wharf, and in no sense can it be designated a superstructure."[31]

§ 178. **Same. Well.** A lien is now given expressly on wells, in the first clause of section eleven hundred and eighty-three, relating to structures.[32] Although it was intimated, as dictum, that this term was probably intended to include oil-wells,[33] yet a well is a structure or a part of a mining claim, depending upon the circumstances of the case.[34]

§ 179. **Same. Tunnel.** Tunnels are very often constructed in mining claims, and in such cases it would seem that the principles applicable to mining claims would pre-

[30] Giant Powder Co. v. San Diego F. Co., 88 Cal. 20, 22, 25 Pac. Rep. 976.

Ditch and flume in mining claim: See Williams v. Mountaineer G. M. Co., 102 Cal. 134, 140, 34 Pac. Rep. 702, 36 Id. 388.

New Mexico. See Ford v. Springer Land Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

[31] Ellison v. Jackson W. Co., 12 Cal. 542, 554 (1855); Horn v. Jones, 28 Cal. 195, 204. See Head v. Fordyce, 17 Cal. 149, 153 (1856). But see Reynolds v. Hosmer, 51 Cal. 205, 208.

Utah. Canal: Garland v. Irr. Co., 9 Utah 350, 34 Pac. Rep. 368.

Washington. Nelson v. Clerf, 4 Wash. 405, 30 Pac. Rep. 716.

[32] **Kerr's Cyc. Code Civ. Proc.,** § 1183, as amended in 1899.

[33] Parke and Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 493, 82 Pac. Rep. 51.

[34] See § 172, ante.

Washington. Lien allowed on a well: Lee v. Kimball (Wash.), 88 Pac. Rep. 1121.

vail, to the same extent, at least, as in the case of wells and other structures enumerated in section eleven hundred and eighty-three.[35]

§ 180. Same. Machinery. The chapter[36] in which the provisions relating to mechanics' liens are found relates to liens upon real property, and it seems that under these sections the work upon a machine must be upon it as a fixture to the realty.[37] And where a machine does become a fixture, the work done or materials furnished for it may, under certain circumstances, be regarded as done or furnished for the building or structure.[38]

[35] See Williams v. Mountaineer G. M. Co., 102 Cal. 134, 140, 34 Pac. Rep. 702, 36 Id. 388.

As to work on a tunnel not in a mining claim, see Giant Powder Co. v. San Diego F. Co., 88 Cal. 20, 22, 25 Pac. Rep. 976. See also Ah Louis v. Harwood, 140 Cal. 500, 74 Pac. Rep. 41 (tunnel to develop water impliedly held to fall within the first clause of § 1183 of **Kerr's Cyc. Code Civ. Proc.,** on structures).

See also § 153, ante.

[36] **Kerr's Cyc. Code Civ. Proc.,** pt. ii, tit. iv, ch. ii, §§ 1183 et seq.

[37] So intimated in March v. McCoy, 56 Cal. 85, 87 (1856). See, in this connection, Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932.

Liens upon machines, which are personal property, are provided for under other laws: See Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; such as the threshing-machine act, March 12, 1885 (Stats. 1885, p. 109), and the general common-law liens dependent upon possession, which have their enunciation in §§ 3049, 3051, and 3052, **Kerr's Cyc. Civ. Code,** and notes. See also Jordan v. Myres, 126 Cal. 565, 566, 58 Pac. Rep. 1061.

Washington. See Vendome T. B. Co. v. Schettler, 2 Wash. 457, 27 Pac. Rep. 76.

[38] See Donahue v. Cromartie, 21 Cal. 80, and Hinckley v. Field's B. & C. Co., 91 Cal. 136, 27 Pac. Rep. 594.

Machinery furnished as a material-man: Roebling Sons Co. v. Humboldt E. L. & P. Co., 112 Cal. 288, 290, 44 Pac. Rep. 568. See Kennedy L. & O. Co. v. New Albany W. W., 62 Ind. 71.

Pump for water-works: Goss v. Helbing, 77 Cal. 190, 191, 19 Pac. Rep. 277.

See note 19 Am. St. Rep. 717.

Things affixed to other works come within the rule: Donahue v. Cromartie, 21 Cal. 80.

In McGreary v. Osborne, 9 Cal. 119, under the act of 1856, which did not, in terms, give a lien upon a machine, an attempt was made to enforce a lien upon a machine affixed to the realty, and the court seems to hold that the machine came within the meaning of "superstructure" as used in the act. See §§ 166 et seq., ante.

Well, machinery for: See Parke and Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 492, 82 Pac. Rep. 51.

Arizona. A smelter is a "mill" or "manufactory," within the meaning of § 2278, Rev. Stats.: McAllister v. Benson M. & S. Co., 2 Ariz. 350, 16 Pac. Rep. 271.

See also authorities in note 19, this note.

§ 181. Same. Railroad. A railroad is one of the structures enumerated in section eleven hundred and eighty-three,[39] and much difficulty has been experienced in determining the extent of liens on such structures; a matter which will be more fully developed at another place.[40]

§ 182. Mining claims, and real property worked as a mine. Second clause of statute. The second clause of section eleven hundred and eighty-three is not restricted in its operation to mines of ore.[41]

[39] Bringham v. Knox, 127 Cal. 40, 59 Pac. Rep. 198.

See notes 7 Am. & Eng. Ann. Cas. 269-272, 8 L. R. A. 700.

Hawaii. A portion of a railroad, and not the whole railroad, held to be a "structure": Hackfeld v. Hilo R. Co., 14 Hawn. 448, 455.

Oregon. Lien on railroad, under Laws 1889, p. 75: See Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Rep. 656.

Under Laws 1885, p. 13, railroad was included under the term "other structures": Bau v. Columbia S. R. Co., 117 Fed Rep. 21, 30, 54 C. C. A. 407, reversing s. c. 109 Fed. Rep. 499.

Act of 1889. Considering the peculiar provisions of the act of 1889, the most obvious reason for its passage is that the legislature thereby intended to take the subject of claims against railway corporations for materials and labor furnished out of the operation of the general lien law of 1885, and put it under this special act, which does not require any notice of the claim to be filed with any clerk or other officer, and provides a special proceeding, in which all such claims must be enforced as in one suit.

Railway is a structure: Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470, 472, 8 L. R. A. 700, **distinguished** in Pennsylvania S. Co. v. J. E. Potts S. & L. Co., 63 Fed. Rep. 11, 11 C. C. A. 11, 22 U. S. App. 537.

Washington. Under § 1957, Code of 1881, which enumerated as objects "railroads" and "any other structure," it was held that there was no lien upon a street-railway, where the owner has no interest in the land over which it is laid, but a mere license, as the street-railway company owns the structure laid by it on the highway and a franchise to collect fares, but such license is not a distinct easement, and hence such railway is not a "structure," there being no lien upon a structure where there is none upon the land: Kellogg v. Littell & S. Mfg. Co., 1 Wash. 407, 25 Pac. Rep. 461; and a distinction was drawn between "street-railways" and "steam-railroads" in this respect: Front Street C. R. Co. v. Johnson, 2 Wash. 112, 25 Pac. Rep. 1084, 11 L. R. A. 693; Pacific R. M. Co. v. James Street Consol. Co., 68 Fed. Rep. 966, 16 C. C. A. 68, 29 U. S. App. 698. But see New England Engineering Co. v. Oakwood Street R. Co., 75 Fed. Rep. 162 (Ohio C. C.). See also Laidlaw v. Portland V. & Y. R. Co., 42 Wash. 292, 84 Pac. Rep. 855.

[40] See "Extent of Lien," §§ 438 et seq., post.

[41] Berentz v. Belmont O. M. Co., 148 Cal. 577, 84 Pac. Rep. 47, 113 Am. St. Rep. 308, reversing s. c. (Cal. App.) 84 Pac. Rep. 45.

Nevada. No lien on mine or power plant, unconnected with mill, for work on mill: Salt Lake Hardware Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632.

The term "mining claim" has always been applied to the portion of the mineral land to which the right of exclusive possession and enjoyment by private persons has been asserted by actual occupation or by compliance with the local mining laws, rules, usages, and customs.[42] It is that portion of the mineral land which a miner, for mining purposes, takes up and holds in accordance with the mining law.[43]

Land, the title to which is held under Spanish or Mexican grant, although mineral in character, is not a "mining claim," and, before the amendment of 1903, it was held that the mechanic's-lien law had no application to labor on mines in such grants.[44] And, likewise,

Oregon. A mine, stamp-mill, and a tramway from the mill to the mine, do not, under Hill's Ann. Laws, § 3669, constitute such an entirety as to render a lien for material used in erecting the mill and in constructing the tramway void because such lien was not filed against the mine also: Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994.

In California, rule is otherwise: See authorities, note 22, this chapter.

[42] Williams v. Santa Clara M. Assoc., 66 Cal. 193, 198, 5 Pac. Rep. 85, 4 West Coast Rep. 616; Morse v. De Ardo, 107 Cal. 622, 624, 40 Pac. Rep. 1018.

Does "mining claim" include deeded land? Whether "mining claim" to be construed as in any case applying to land owned in fee-simple, referred to, but not decided: Berentz v. Belmont O. M. Co. (Cal. App.), 84 Pac. Rep. 45, judgment reversed 148 Cal. 577, 84 Pac. Rep. 47, 113 Am. St. Rep. 308.

Idaho. The milling of ore in a mill on the mine is work on the mine, and not on the ore, within the meaning of the law: Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 74 Pac. Rep. 958.

Oregon. The provision of the statute giving a lien on mining claims (Laws 1891, p. 76) applies to claims in which minerals have not, as well as to those on which minerals have, been found: Williams v. Toledo C. Co., 25 Oreg. 426, 36 Pac. Rep. 159, 42 Am. St. Rep. 799.

[43] Morse v. De Ardo, 107 Cal. 622, 623, 40 Pac. Rep. 1018; Johnson v. California L. Co., 127 Cal. 283, 287, 59 Pac. Rep. 595. See Marble Co. v. Railroad Co., 25 Land Dec. 233; Aldritt v. Railroad Co., 25 Land Dec. 349.

See **Martin's Mining Law,** passim.

[44] Williams v. Santa Clara M. Assoc., 66 Cal. 193, 198, 5 Pac. Rep. 85, 4 West Coast Rep. 616. See Morse v. De Ardo, 107 Cal. 622, 624, 40 Pac. Rep. 1018. In the case last cited it was said: "In Bewick v. Muir, 83 Cal. 368, 372, 23 Pac. Rep. 383, 390, which respondent contends modifies and explains the law declared in Williams v. Santa Clara Mining Assoc., supra, this court was called upon to decide whether the phrase 'mining claim' of the lien law included mining claims after the possessory right or claim had matured into a perfect title by the issuance of a mineral patent from the United States; and this was all it was called upon to decide. This court said: 'The

Land held under an agricultural patent is not a "mining claim," within the meaning of the statute [45] before its amendment in 1903, and no lien was given for work upon a mine in the same.[46] The amendment of 1903 to section eleven

words "mining claim," as used in the law, have no reference to the different stages in the acquisition of the government title. In our opinion, it includes all mines, whether the title is inchoate, as in the case of a mining claim in its strict sense, or perfect, as in the case of a fee-simple title.' Reference to the record in this last-named case discloses not only that the complaint pleaded that all the mining land and ground described therein were mining claims, but that the court in its findings so declared. In the case at bar there is no such finding. It follows, therefore, that the further expressions of the court in Bewick v. Muir, supra, were not only unnecessary to the decision, but were addressed to a condition neither involved in nor presented by the facts of the case. . . . We must turn, therefore, to Williams v. Santa Clara Mining Assoc., supra, as containing the last authoritative expression of the court upon the question, and we deem its reasoning to be unassailable and its conclusion determinative of the case at bar." See also Malone v. Big Flat M. Co., 76 Cal. 578, 583, 18 Pac. Rep. 772.

[45] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[46] Morse v. De Ardo, 107 Cal. 622, 623, 40 Pac. Rep. 1018. This decision, however, cites and quotes from Helm v. Chapman, 66 Cal. 291, 5 Pac. Rep. 352, which depended upon § 1183, Cal. Code Civ. Proc. before it was amended in 1880. At that time "mining claims" were enumerated among "structures," and it was held that "without doing violence to the received meaning of language, a mine or pit sunk within a mining claim may be called a "structure." After the amendment, this case was cited on the same point, and it was held that a "mine is a 'structure,' within the meaning of the statute": Silvester v. Coe Quartz M. Co., 80 Cal. 510, 512, 22 Pac. Rep. 217; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 142, 34 Pac. Rep. 702, 36 Pac. Rep. 388.

It was said in the last-mentioned case (p. 141) that: "In Helm v. Chapman, 66 Cal. 291, 5 Pac. Rep. 352, 5 West Coast Rep. 127, it was said a mine or pit may be called a structure, and '§ 1183 does not, it is true, provide for a lien upon mines, but upon "mining claims"'"; and also (p. 139): "The procedure provided for acquiring liens upon 'structures' are not, in all respects, applicable to those claiming liens upon mining claims. They cannot all date back to the commencement of the work. On a mine the work is always going on; may have commenced before the laborers were born, and may continue indefinitely. . . . The code does not seem to have provided for all the cases which may arise in regard to liens upon mining claims. We can only follow the procedure so far as applicable. For that purpose, the mining claim must stand in the place of the structure as the property to be charged with the lien. . . . There can be no harm in so speaking of it, if we do not lose sight of essential differences, when it is necessary to discriminate." See also California P. W. v. Blue Tent Consol. H. G. M. Co. (Cal.), 22 Pac. Rep. 391; Pacific Rolling M. Co. v. Bear Valley Irr. Co., 120 Cal. 94, 98, 52 Pac. Rep. 136, 65 Am. St. Rep. 158. See Big Blackfoot M. Co. v. Bluebird M. Co., 19 Mont. 454, 48 Pac. Rep. 778; Alvord v. Hendrie, 2 Mont. 115.

In Bewick v. Muir, 83 Cal. 368, 372, 23 Pac. Rep. 389, 390 (see preceding note), it was also said: "The decision in Williams v. Santa Clara M. Assoc., 66 Cal. 193, 5 Pac. Rep. 85, 4 West Coast Rep. 616,

hundred and eighty-three was evidently intended to extend the right of lien to these cases.

Oil-well. A tract of eighty acres with a well upon it for extracting mineral oil is a mining claim or mine.[47]

§ 183. **Definition of "mine."** It has been held that by the word "mine," as used in the description in a claim of lien on the "Red Cloud Mine," was not meant a subterranean cavity or passage, especially a pit or excavation in the earth from which metallic ores or other mineral substances are taken by digging, as that word is defined by Webster, but the whole claim or body of mining-ground.[48]

§ 184. **Grading and street-work under code provision.** The work referred to in section eleven hundred and ninety-one of the code [49] must be done upon the objects enumerated, in an incorporated city or town,[50] and if done outside of such incorporated city or town, does not fall within this section.[51] Under this section it is to be noted that the object upon which the work must be done is by no means necessarily a part of the property upon which the lien is given. Thus a lien is given upon the lot for work done upon the street in front of or adjoining the same.

A sidewalk, being one of the objects enumerated in section eleven hundred and ninety-one of the Code of Civil Proce-

is not in conflict with this [namely, that a lien might be had upon mines as well as upon mining claims, as quoted above]. Although there are some expressions in the opinion in that case which seem to countenance the opposite view, we think that what was decided was merely that the adjacent land, which the defendant held under a Spanish grant, was not mineral land, or appurtenant thereto. Such land was therefore not a mine or a mining claim, in any sense, and consequently was not liable as such."

Montana. See California paragraph, this note.

[47] Berentz v. Belmont O. Co., 148 Cal. 577, 582, 84 Pac. Rep. 47, 113 Am. St. Rep. 308, reversing s. c. (Cal. App.) 84 Pac. Rep. 45.

See **Martin's Mining Law,** passim.

[48] Tredennick v. Red Cloud Consol. M. Co., 72 Cal. 78, 81, 13 Pac. Rep. 152. See also Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 333, 80 Pac. Rep. 74.

See **Martin's Mining Law,** § 1, and passim.

[49] **Kerr's Cyc. Code Civ. Proc.,** § 1191.

[50] Durrell v. Dooner, 119 Cal. 411, 51 Pac. Rep. 628; Bryan v. Abbott, 131 Cal. 222, 63 Pac. Rep. 363.

[51] Durrell v. Dooner, 119 Cal. 411, 51 Pac. Rep. 628.

dure, has been held to be a part of the building, under certain circumstances.[52]

A system of sewers is an improvement of lots within the sewer district, and, under a private contract by the lot-owners, duly made, to pay in proportion to frontage, the contractor has a lien, under this section, upon each lot for the price which the owner has agreed to pay, both for the portion of the sewer which is part of the general system, and for the branch sewers.[53]

§ 185. **Fixtures.**[54] **In general.** Fixtures may be regarded in two aspects: 1. As a thing over which the lien on the realty may extend, as being a part thereof, whether the work was done on, or in the construction of, such fixture, or not; and 2. As indicating the character of the work which results in the accomplished object, for work on which the lien is given. The first head will be more fully considered later, under the chapter relating to the extent of lien, where the rights of other parties in this connection are dwelt upon.

§ 186. **Same. Question of fact. Building.** Whether, in any case, buildings which are placed upon land become fixtures is a question of fact, to be determined upon the evidence of that particular case. The mere erection of a building upon land does not necessarily make it a fixture; and whether it be a fixture depends upon various circumstances and relations connected with its being placed upon the land.[55]

[52] McClain v. Hutton, 131 Cal. 132, 136, 63 Pac. Rep. 182, 61 Pac. Rep. 273.

See "Extent of Lien," §§ 438 et seq., post.

In Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 Pac. Rep. 555, it was said that presumptively a sidewalk would not be a part of the building.

Oregon. Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 164, 44 Pac. Rep. 390. All the provisions of the act "respecting the securing and enforcing" of the liens are made applicable to similar work: Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305.

[53] Williams v. Rowell, 145 Cal. 259, 261, 78 Pac. Rep. 725 (Shaw and Angellotti, JJ., dissenting).

[54] See also "Machinery," § 180, ante.

As to fixtures generally, see very full note, **Kerr's Cyc. Civ. Code.** § 660.

[55] Miller v. Waddingham, 91 Cal. 377, 379, 27 Pac. Rep. 750, 13 L. R. A. 680; Dietz v. Mission Transfer Co., 95 Cal. 92, 102, 30 Pac.

§ 187. **Same. Principles of determination.** The character of the structure in relation to its permanency, and the intent of the owner in relation to its future use, are controlling factors in determining the question as to whether or not it is a fixture.[56] So, too, the relation existing between the parties is an important element in the determination,[57] and secret agreements between landlord and tenant as to the future use or demolition of the fixture will not be regarded as against a lien claimant who relies upon the permanent manner of construction of the fixture.[58] But section eleven hundred and eighty-three contemplates that the lien shall attach to the property of the owner, not to the property of some other person, and the intention of the parties, as heretofore stated, will, in general, be regarded, as far as the rights of claimants are concerned.[59] In some of the jurisdictions herein considered, the improvement constructed is by the statute regarded as a severable fixture, at least for certain

Rep. 380 (concurring opinion); Jordan v. Myres, 126 Cal. 565, 569, 58 Pac. Rep. 1061.

Intention of parties determines: See Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251; Lavenson v. Standard S. Co., 80 Cal. 245, 22 Pac. Rep. 184, 13 Am. St. Rep. 147.

See also notes 39 Am. St. Rep. 172, 3 L. R. A. 34.

Idaho. Mill as fixture to mine: See Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 74 Pac. Rep. 958, 960.

Utah. Sanford v. Kunkel, 85 Pac. Rep. 363, 1012 (building as fixture).

[56] Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990; Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

[57] Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

Between parties other than claimants:

Colorado. Machinery placed by lessee on mine a trade-fixture, which is removable: Updegraff v. Lesem, 15 Colo. App. 297, 62 Pac. Rep. 342. And see Royce v. Latshaw, 15 Colo. 420, 62 Pac. Rep. 627; Ross v. Campbell, 9 Colo. App. 38, 47 Pac. Rep. 465.

Idaho. Bingham County A. Assoc. v. Rogers, 7 Idaho 63, 59 Pac. Rep. 931 (relation of parties to be considered).

Oregon. Alberson v. Elk Creek G. M. Co., 39 Oreg. 552, 65 Pac. Rep. 978 (personalty placed on mine).

Oklahoma. Bridges v. Thomas, 8 Okl. 620, 58 Pac. Rep. 955 (the presumption being that a building is part of the land, and real property).

Washington. Hall v. Law Guarantee & T. Soc., 22 Wash. 305, 60 Pac. Rep. 643 (between mortgager and mortgagee); Neufelder v. Third Street & S. R., 23 Wash. 470, 63 Pac. Rep. 197, 83 Am. St. Rep. 831, 53 L. R. A. 600 (machinery in a planing-mill); Philadelphia M. & T. Co. v. Miller, 20 Wash. 607, 56 Pac. Rep. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559 (water-heater, bath-tub, mantels).

[58] Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

[59] Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

purposes of the mechanic's-lien law. But in California the improvement is, in general, deemed a fixture to the land.[60]

[60] **In West Coast L. Co. v. Apfield,** 86 Cal. 335, 338, 24 Pac. Rep. 993, it was said: "By its [the lease's] terms, he [the owner of the fee] has demised all that there is of the 'real property,' with its appurtenances. That includes not only the land, but everything that is affixed, incidental, or appurtenant to the land: Civ. Code, § 658. That which is affixed includes that which is 'imbedded into it, as in the case of walls, or permanently resting upon it, as in the case of 'buildings': Civ. Code, § 660. And that is deemed incidental or appurtenant to land which is by right used with the land for its benefit: Civ. Code, § 662. . . . It was a large and substantial structure, not only apparently 'permanently resting upon' the lot, but the proof shows that it was resting upon mudsills 'imbedded in it,' and also that, when completed, it was 'used with the land.' To all appearance, the lot and building was a single entity of 'real property.' Again, as we have before said, there was neither a reservation of right nor a grant of right to remove any buildings; but, on the contrary, there was an express covenant to surrender, at the expiration of the term, 'in as good state and condition as reasonable use and wear thereof will permit, damage by the elements alone excepted.' This at least was an express provision negativing the right to remove. 'A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section': Civ. Code, § 820. The preceding section, being the one referred to as 'the last section,' gives him the right to 'occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy.' Nowhere does the code give the right to remove buildings, unless that right is expressly granted or reserved in the instrument creating the tenancy, or the buildings are such, or so erected, as not to partake of the realty. 'When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in § 1019, belongs to the owner of the land, unless he chooses to require the former to remove it': Civ. Code, § 1013. 'A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises': Civ. Code, § 1019. This would hardly authorize the removal of a four-story building erected to be used for stores and as a lodging and boarding house." See also Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. Rep. 184, 13 Am. St. Rep. 147.

Montana. See Stenberg v. Liennemann, 20 Mont. 457, 52 Pac. Rep. 84, 63 Am. St. Rep. 636.

Oregon. "The weight of modern authority, keeping in mind the exceptions as to constructive annexation admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests: 1. Real or constructive annexation of the article in question to the realty. 2. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. 3. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of

§ 188. Lien primarily on structure. It has been seen, moreover, that the lien, under the California statute, is primarily upon the structure, and not upon the land, and that the court, under certain circumstances, when the land is not affected by the lien, may order the structure to be severed from the realty, and sold apart from the same; the court saying, "When the building is destroyed by fire before completion, there can be no lien against the land on which it stood."[61]

§ 189. Work upon fixtures, how deemed. Work done upon fixtures is deemed to be done upon the real property to which the same are affixed.[62]

An ice-box so constructed that it could not be removed from the building without tearing it to pieces, and built into the warehouse as a part thereof, and securely attached so

the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation, and the purpose or use for which the annexation has been made": Helm v. Gilroy, 20 Oreg. 517, 26 Pac. Rep. 851. Under these principles it was held that, as between the claimant and the lessee, wainscoting attached with screws to strips nailed to the wall of a room to be used as a saloon by a lessee, and oak veneering nailed to the walls, etc., are not removable trade-fixtures, but form alterations of the building, and the lessee's interest therein was bound by a mechanic's lien for affixing the same: Matthiesen v. Arata, 32 Oreg. 342, 50 Pac. Rep. 1015, 67 Am. St. Rep. 535. See, as to rule, Helm v. Gilroy, 20 Oreg. 517, 26 Pac. Rep. 851; Honeyman v. Thomas, 25 Oreg. 539, 36 Pac. Rep. 636.

[61] Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 689, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75.

See § 16, ante.

Lien upon building distinct from land: See notes 2 Am. & Eng. Ann. Cas. 689-691, 62 L. R. A. 369, 383.

Appurtenances: Note 15 L. R. A. 653.

New Mexico. See Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

Utah. See Sanford v. Kunkel, 85 Pac. Rep. 363, 1012.

[62] Mandary v. Smartt, 1 Cal. App. 498, 500, 82 Pac. Rep. 561.

As to counters, sideboards, shelving, ice-box, see Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932.

See "Presumptions on Appeal," § 974, post, and Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

See also "Extent of Lien," §§ 438 et seq.; "Machinery," § 445, post.

Doubted whether a dance-hall, consisting of a covered structure resting on sills, partly weather-boarded, open sides, and without doors or windows, is a fixture, within the meaning of the mechanic's-lien law, so as to allow a lien for the work of construction thereof: Lothian v. Wood, 55 Cal. 159, 163. See Evans v. Judson, 120 Cal. 282, 285, 52 Pac. Rep. 585.

that the same could not be removed without injury thereto, nor without injury to the warehouse, was held to be a part of the building, and sufficient to support a lien.[63]

§ 190. The severance of buildings from the freehold proprio vigore changes the character of the houses from real to personal property, irrespective of the means by which it was accomplished.[64] Where a house is moved to a lot, and, by agreement, is to remain on the lot only a few days, and rests on mudsills on the top of the ground, the house is personal property, and a lien for the material with which the house was built cannot be enforced against the land upon which it thus temporarily rested.[65]

§ 191. Work on fixtures in mine. In California, a distinction must always be observed between the fixtures on a mining claim, under section six hundred and sixty-one of the Civil Code, which would be personal property, and fixtures

New Mexico. Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586: "The statute does not require, as a condition upon which the lien on the realty is made to depend, that the improvements should become a part thereof. The lien attaches to the 'structure,' and to the land upon which it is 'constructed.'" See also Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284, 286, and Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087.

Oregon. See Bank of Idaho v. Malheur Co., 30 Oreg. 420, 45 Pac. Rep. 781, 35 L. R. A. 141. But see also Patterson v. Gallagher, 25 Oreg. 227, 35 Pac. Rep. 454, 42 Am. St. Rep. 794.

Washington. Under the Code of 1881, ch. cxxxviii, no lien could be obtained upon personal property unless it had become a part of the land: Schettler v. Vendome Turkish B. Co., 2 Wash. 457, 27 Pac. Rep. 76; Kellogg v. Littell & S. Mfg. Co., 1 Wash. 407, 25 Pac. Rep. 461 (there being no express provision of the statute allowing a lien upon the building apart from the land). Both of these cases are explained in Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586. See also Front Street C. R. Co. v. Johnson, 2 Wash. 112, 25 Pac. Rep. 1084, 11 L. R. A. 693.

Wyoming. See Fein v. Davis, 2 Wyo. 118, 123 (1871), as to enforcing a lien upon the building as separate from the land.

[63] Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

See § 174, ante.

[64] Stowell v. Waddingham, 100 Cal. 7, 34 Pac. Rep. 436; Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90. See Moisant v. McPhee, 92 Cal. 76, 28 Pac. Rep. 46.

[65] Fresno L. & S. Bank v. Husted (Cal., June 17, 1897), 49 Pac. Rep. 195. Whether a lien could be enforced against the house as personal property, or otherwise, or upon the lot upon which it was originally constructed, was not decided.

Compare: Stowell v. Waddingham, 100 Cal. 7, 34 Pac. Rep. 436.

New Mexico. See Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

under section six hundred and sixty. Section six hundred and sixty-one of said code provides: "Sluice-boxes, flumes, hose, pipes, railway tracks, cars, blacksmith-shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine." Under this section, work, such as sharpening picks and drills, and labor on machinery, such as iron pipes, "giants," etc., used in developing a mine, while so used upon the mine, is work upon the mine, and a sufficient basis to support a lien.[66] But the machinery and tools must be actually used in the work or development of the mine.[67]

§ 192. **Public property.**[68] Suits may be brought against the state in such manner and in such courts as shall be

[66] Malone v. Big Flat G. M. Co., 76 Cal. 578, 583, 18 Pac. Rep. 772.

[67] Hamilton v. Delhi M. Co., 118 Cal. 148, 50 Pac. Rep. 378. See Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

Colorado. The intention of the party to make a permanent accession to the freehold, and the use to which the article is to be applied, are controlling questions in determining whether it is a fixture. If it constitutes a part of a plant of machinery necessary to the successful operation of the whole, or if its use is essential to the operation of some part of the machinery which is physically attached to the freehold, then it may in many cases be properly termed a fixture, even though it wholly lacks a permanent physical attachment to the realty. Each case is one of mixed law and fact. Colorado statute (Gen. Stats., § 2148) very liberal: Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 220, 50 Pac. Rep. 744 (1889) (a number of illustrations are given).

Oregon. A derrick erected by a tenant in a quarry, by placing a post upright in a socket upon the ground, with guy-ropes extending from its top to stakes set in the ground, is a removable trade-fixture, and not subject to lien: Honeyman v. Thomas, 25 Oreg. 539, 36 Pac. Rep. 636.

[68] **Public buildings and works,** acts concerning: See **Henning's General Laws,** pp. 1087-1095, 1099-1105; County Government Act, **Henning's General Laws,** pp. 189, 196 (§ 25, subd. 8), 206 (§ 37); **Kerr's Cyc. Pol. Code,** §§ 3233, 3234, 3244, 3245, and notes. See also McPherson v. San Joaquin Co. (Cal.), 56 Pac. Rep. 802.

Public works, and mechanics' liens: See 4 Current Law, 1124, also notes 35 L. R. A. 141, and 27 Am. Rep. 83.

Contractor's bond on public work: See Union S. M. Works v. Dodge, 129 Cal. 390, 394, 62 Pac. Rep. 41; People's L. Co. v. Gillard, 136 Cal. 55, 61, 68 Pac. Rep. 576.

Colorado. Contractor's bond on public work: People v. Dodge, 11 Colo. App. 177.

Washington. Contractor's bond on public work: Crane Co. v. Ætna Indemnity Co. (Wash.), 86 Pac. Rep. 849; Ihrig v. Scott, 5 Wash. 584, 32 Pac. Rep. 466; Maxon v. School Dist., 5 Wash. 142, 31 Pac. Rep. 462, 32 Pac. Rep. 110.

Gen. Stats., § 2415, which required municipal corporations to take a bond from contractors doing work or making improvements for

directed by law.[69] Public property is generally exempt from execution,[70] and hence a lien cannot be had upon public property or a public building for labor performed thereon or materials furnished therefor, in the absence of express statutory allowance; and the expressions "property," as used in the constitution,[71] and "any building," in the statute,[72] do not give a lien upon such public property. Thus mechanics' liens cannot be acquired or enforced against a public-school house,[73] against a county building, such as a hall of records,[74] nor against a monument erected in a public park of a municipality by private subscription, where it becomes a part of the land and is the property of the municipality.[75] The special statutory proceeding in the nature of a garnishment, however, applies to work on public buildings, under the California statute. This subject will be discussed in detail hereafter, under its appropriate head.[76]

such corporations, conditioned for the payment of all laborers, etc., was not applicable to street contracts: Clough v. City of Spokane, 7 Wash. 279, 34 Pac. Rep. 934. This act is not in conflict with Wash. Const., art. ix, § 2, and applies to school districts: Pacific Mfg. Co. v. School Dist., 6 Wash. 121, 33 Pac. Rep. 68.

[69] Cal. Const. 1879, art. xx, § 6, **Henning's General Laws**, p. civ.

[70] **Kerr's Cyc. Code Civ. Proc.**, § 690, subd. 15 (as amended March 22, 1907), and note.

[71] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws**, p. civ.

[72] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[73] Kruse v. Wilson (Cal. App.), 84 Pac. Rep. 442; Mayrhofer v. Board of Education, 89 Cal. 110, 112, 26 Pac. Rep. 646, 23 Am. St. Rep. 451. See Board of Education v. Blake (Cal.), 38 Pac. Rep. 536.

Colorado. Floorman v. School Dist., 6 Colo. App. 319, 40 Pac. Rep. 469.

Montana. Whiteside v. School Dist., 20 Mont. 44, 49 Pac. Rep. 445.

Oregon. Portland L. Co. v. School Dist., 13 Oreg. 283, 10 Pac. Rep. 350.

Utah. Board of Education v. Pressed Brick Co., 13 Utah 211, 44 Pac. Rep. 709 (1890).

Washington. But **contra**, apparently under special statutes: Maxon v. School Dist., 5 Wash. 142, 31 Pac. Rep. 462, 32 Pac. Rep. 110.

[74] Bates v. Santa Barbara Co., 90 Cal. 543, 546, 27 Pac. Rep. 438. But in this case the special garnishment proceeding of the mechanic's-lien law was allowed as against the contractor.

See "Notice," §§ 547 et seq., post.

Oregon. Nor was such lien allowed against a public bridge, although "bridges" are enumerated among the objects in § 3669, Hill's Ann. Laws: Bank of Idaho v. Malheur County, 30 Oreg. 420, 45 Pac. Rep. 781, 35 L. R. A. 141.

[75] Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487.

[76] See Bates v. Santa Barbara Co., 90 Cal. 543, 546, 27 Pac. Rep. 438, and "Notice to Owner," §§ 547 et seq., post.

CHAPTER XI.

BUILDING CONTRACTS. GENERAL PRINCIPLES.

§ 193. General principles applicable.
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§ 193. General principles applicable.[1] The general principles applicable to contracts are equally so to building contracts between the owner and his contractor, and between

[1] **Contract to build in lease:** McGlynn v. Moore, 25 Cal. 384; Chipman v. Emeric, 5 Cal. 49.

Building and construction contracts: See 3 Current Law, 550.

Mechanic's lien, under contract made or to be performed in another state: See note 38 L. R. A. 410.

Contract for public work: See Newport W. & L. Co. v. Drew, 125 Cal. 585, 58 Pac. Rep. 187.

Entry in the minutes of a school board, merely showing that the plans submitted to it had been adopted, expresses no contract: Todd v. Board of Education, 122 Cal. 106, 54 Pac. Rep. 527.

See § 192, ante.

the owner and his material-men or laborers, except where the statute has changed the rule.[2] It is here intended to consider only those principles peculiar to the contract under discussion.

§ 194. Term "original contract" not used in the statute. The California statute nowhere uses the expression "original contract," although it is frequently found in the decisions construing the statute. In the chapter on mechanics' liens is often found the terms, "such contracts,"[3] "the contract,"[4] and "his [the original contractor's] contract."[5] The statute, however, frequently speaks of the "original contractor."[6]

§ 195. Essentials of contract. How treated herein. The essentials of a common-law contract must, of course, exist,[7] not alone between the original contractor and owner, but also between any claimant and the person with whom he stands in privity. While a sufficient common-law contract may exist between such persons, it does not necessarily follow that an adequate contractual relation is established upon which to base a lien of the contracting person or his subclaimants. The adjudged law, so far as it relates to the matters treated herein, will be considered in detail in its appropriate place.

§ 196. Definition of "contract." A contract is an agreement to do or not to do a certain thing;[8] and it is essential to the existence of a contract that there shall be: 1. Parties

Contract for drawing plans and specifications in anticipation of proceedings for the building of a public-school house: See Brown v. Board of Education, 103 Cal. 531, 535, 37 Pac. Rep. 503.

See also 7 Am. & Eng. Ann. Cas. 617.

[2] See West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533, 534.

[3] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1184. This apparently refers to statutory original contract.

[4] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[5] **Kerr's Cyc. Code Civ. Proc.,** §§ 1187, 1193.

[6] See "Original Contractor," §§ 45-65, ante.

[7] See **Kerr's Cyc. Civ. Code,** §§ 1427-1701, and notes.

Oregon. Requisites of contract under act of 1874: See Tatum v. Cherry, 12 Oreg. 135, 6 Pac. Rep. 715.

[8] **Kerr's Cyc. Civ. Code,** § 1549, and note.

capable of contracting; 2. Consent of the parties; 3. A lawful object; and 4. A sufficient cause or consideration.[9]

§ 197. Definition of "building contract." In the absence of statutory qualifications, a "building contract" may be defined as a legal agreement between two or more persons, capable of contracting, for the construction, alteration, addition to, or repair of a structure or other work as a fixture to the realty.[10]

§ 198. Parties to contract. Competency. There must be parties capable of contracting;[11] and, so, officers of the court, without the direction of the court, cannot, as a rule, bind property in their charge by contracts which would otherwise impose a mechanic's lien upon the same.[12]

§ 199. Same. Guardian of minor. A guardian of a minor cannot subject the estate and property of his ward to a mechanic's lien without first obtaining an order of court authorizing the guardian to make the contract; and the infant is not bound by the guardian's contract for the erection or repair of the building.[13]

[9] **Kerr's Cyc. Civ. Code,** § 1550, and note.

[10] See "Nature of Labor," §§ 130-165, ante; "Object of Labor," §§ 166-192, ante.

Utah. A contract is an agreement between two or more persons, for a valuable consideration, to do or not to do some particular thing; and when the undertaking refers to constructing, erecting, or repairing an edifice, or other work or structure, it may be called a building contract: Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986.

[11] Persons able to contract: See **Kerr's Cyc. Civ. Code,** §§ 25, 33, 35, and notes.

As to agent, see "Agency," §§ 572 et seq., post.

[12] **Colorado.** Those who furnish supplies to, or perform labor for, a receiver are, in law, supposed to know whether he possesses the powers which he assumes to exercise: Hendrie & B. Mfg. Co. v. Parry (Colo.), 86 Pac. Rep. 113.

[13] Fish v. McCarthy, 96 Cal. 484, 31 Pac. Rep. 529, 31 Am. St. Rep. 237; Hunt v. Maldonado, 89 Cal. 636, 27 Pac. Rep. 56; Guy v. Du Uprey, 16 Cal. 195, 76 Am. Dec. 518.

Nor is there any equitable lien on the property for the value of the improvements, such party being fully informed as to the title and condition of the property: Guy v. Du Uprey, 16 Cal. 195, 76 Am. Dec. 518.

New Mexico. But see, as to contract of guardian of minors, Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726, 729; Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

§ 200. **Same. Executor.** An executor of a will, without an order of court therefor, cannot enter into a valid contract for the improvement of the street in front of the property of the estate.[14]

The executor can make no contract which would give a contractor's laborers in a mine, known to be the property of the estate, a right to file liens on the same. A contract to work such property, signed by a person as executor, if it is notice to claimants at all, is notice of everything that it contains, and would prevent the lien from coming into existence.[15]

Where the executor of an estate makes an unauthorized original contract, a purchaser of the property can, during the performance of the work, agree to pay for the work, but such agreement would not authorize a mechanic's lien, even for work done after the purchase, where the claim of lien simply states that the purchaser agreed to pay for the work, nor, under such circumstances, could there be an equitable lien, where there was no agreement, express or implied, on the part of the purchaser to create the lien.[16]

§ 201. **Same. Corporations.** Corporations can contract in same manner as natural persons; but where the president and secretary of a corporation enter into a contract for the erection of a building, for and on behalf of the corporation, with a firm of which the president is a member, the contract will be held void, as in breach of the fiduciary relation of the president to the stockholders, and will confer no right to a mechanic's lien; so strict is the rule in this regard, that no inquiry can be made into the fairness of the contract thus entered into. While the firm cannot enforce the contract,

[14] San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. Rep. 255.

Arizona. Lien against property of an estate under a contract made with an administrator: See point raised, but not decided, in Bogan v. Roy (Ariz.), 86 Pac. Rep. 13, 15.

Oregon. Lien against estate of lessor: See Hobkirk v. Portland Nat. Baseball Club, 44 Oreg. 605, 76 Pac. Rep. 776.

Wyoming. As to administratrix, see Selbel v. Bath, 5 Wyo. 409, 40 Pac. Rep. 756.

[15] Chappius v. Blankman, 128 Cal. 362, 364, 60 Pac. Rep. 925; San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 66 Pac. Rep. 255.

[16] San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 222, 224, 225, 66 Pac. Rep. 255.

it can recover, as upon a quantum meruit, for what the corporation actually received in value under the invalid contract.[17]

§ 202. **Same. Owner. Contract not binding, contractor's lien fails. Implied contract.** If the original express contract is not binding, the lien of the contractor necessarily fails.[18] There can be no implied contract where the work is done against the express order of the owner.[19]

§ 203. **Same. Owner.** It is not necessary that the person contracting for the erection of the building shall at the time be the owner of the realty upon which the building is to be erected,[20] so far as the mere validity of the contract

[17] Sims v. Petaluma G. L. Co., 131 Cal. 656, 659, 63 Pac. Rep. 1011, reversing 62 Id. 300. See San Diego v. San Diego & L. A. R. Co., 44 Cal. 106; Wilbur v. Lynde, 49 Cal. 290, 19 Am. Rep. 645; Farmers' & M. Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62; Graves v. Mono Lake H. M. Co., 81 Cal. 303, 22 Pac. Rep. 665; Wickersham v. Crittenden, 93 Cal. 17, 29, 28 Pac. Rep. 788; Berka v. Woodward, 125 Cal. 119, 57 Pac. Rep. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; Aberdeen R. Co. v. Blaikie, 1 Macq. 461.

See **Kerr's Cyc. Civ. Code,** §§ 2229, 2230, and notes.

Montana. Before a corporation can be bound by an agreement made by one or two of its trustees, the burden is on the plaintiff to show the authority of such trustee or trustees to so bind the corporation, or that the corporation ratified it: Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054.

Washington. The contract with a foreign corporation to build is not void, although it has not complied with the statute as to the appointment of an agent, etc.: Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. Rep. 327.

But see **Kerr's Cyc. Civ. Code,** §§ 405-410, and notes.

[18] Fish v. McCarthy, 96 Cal. 484, 485, 31 Pac. Rep. 529, 31 Am. St. Rep. 237.

Guardian cannot subject ward's property to mechanic's lien: Fish v. McCarthy, supra. See Morse v. Hinckley, 124 Cal. 154, 158, 56 Pac. Rep. 896.

[19] De Prosse v. Royal Eagle Dist. Co., 135 Cal. 408, 410, 67 Pac. Rep. 502 (architect's services).

[20] Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 569, 42 Pac. Rep. 154. See Dunlop v. Kennedy (Cal.), 34 Pac. Rep. 92, 96; rehearing granted, in which it was held that the statute does not require that the contract for erecting a building shall be signed by the owner; it is sufficient if it be signed by the reputed owner.

Mechanic's lien on land of married woman: See note 10 L. R. A. 33.

Lien governed by contract with owner: See note 13 L. R. A. 702.

Necessities of contract with and consent of owner: See note 11 L. R. A. 742.

Daughters, as agent of owner in making contract, not liable: See Schindler v. Green (Cal. App.), 82 Pac. Rep. 341, s. c. 149 Cal. 752, 82 Pac. Rep. 631.

is concerned, but he must have a sufficient legal relation to the property and owner, either by way of privity or

Alaska. The owner must have knowledge of the building contract, even if made by a person in possession under a contract of purchase, or the contract must be made at the instance of the owner: Russell v. Hayner, 130 Fed. Rep. 90, 64 C. C. A. 424, 2 Alas. 703 (Dig.) (under Civ. Code, § 265, act June 16, 1900, 31 Stats. at L., p. 535).

Colorado. The lien is founded on a contract, either directly or indirectly: Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612; Little Valeria M. & M. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. Rep. 970.

Contract with lessee: See Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612; Morrell H. Co. v. Princess G. M. Co., 16 Colo. App. 54, 63 Pac. Rep. 807; Schweitzer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843.

The work must be done or materials furnished under contract, express or implied, with the owner of the property upon which the lien is claimed, and the claimant must ascertain for himself whether the person with whom he deals holds such a relation to the work being done on the property as to entitle him to a lien therefor: Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340; Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809; Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458, 459.

The act of 1883 authorized a lien only under a contract with the owner, and persons holding a vendor's lien, in possession of the property, not being owners thereof, could not create a lien: Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809.

Hawaii. A material-man's lien is dependent upon, though not created by, contract. A mere trespasser has no lien, under the statute, for materials furnished and used in a building on another's land. There must be a contract with the owner. The contract with the owner may be either direct with the mechanic or material-man who claims a lien, or it may be with an intermediate contractor, in which latter case there may be a second contract, between the contractor and subcontractor or material-man: Allen v. Reist, 16 Hawn. 23.

What entitles to lien. It is not the contract for erecting or repairing the building that creates the lien, but the use of the materials furnished or labor performed by the contractor; the lien is brought into existence by virtue of the statute; and the contract is entered into presumably in view of and with reference to the statute: Hackfeld v. Hilo R. Co., 14 Hawn. 448, 451.

Idaho. A mere trespasser is not the agent of the owner, and a person who unlawfully ousts the owner cannot create debts which will form the basis of a lien upon a mining claim: Idaho G. M. Co. v. Winchell, 6 Idaho 729, 59 Pac. Rep. 533, 96 Am. St. Rep. 290.

Oregon. Under § 3669, Hill's Ann. Laws, the original contractor being the statutory agent of the owner, it was held that the contract was entered into between the claimants and the owner: Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649 (doctrine questionable).

Under an early statute it was necessary for the contract to be made with the owner or his agent: Wilcox v. Keith, 3 Oreg. 372.

Oklahoma. Contract with husband, as statutory agent of wife: See Limerick v. Ketcham (Okl.), 87 Pac. Rep. 605.

Utah. A contract, express or implied, for the building must have been made with the owner of the land or his authorized agent, to entitle to the lien claimed: Eccles L. Co. v. Martin (Utah), 87 Pac.

estoppel, to render such contract valid, under the general principles of law.

The effect of such contract as a basis for liens of subclaimants is apart from the present inquiry, and will be considered elsewhere.

Effect of contract on the interest of the owner in the property, as well as his personal liability under a contract with a person in privity with the owner, is considered under the subjects of the "Obligations of the Owner," [21] the "Extent of the Lien," [22] and in the sections [23] devoted to the doctrines concerning agency.[24]

§ 204. Same. Owner. Street-work. The statute [25] purporting to give a lien for a street improvement "at the request of the reputed owner of any lot" covers the case of the request of the real owner.[26]

§ 205. Contract made with reference to statute. The parties to a valid statutory original contract are presumed to contract with reference to the statute. The court say: "The legislature may prescribe the form in which contracts shall be executed in order that they may be valid or binding, but it cannot limit the right of parties to incorporate into their contracts respecting property, otherwise valid, such terms as may be mutually satisfactory to them." [27] It has

Rep. 713, 715; Morrison v. Clark, 20 Utah 432, 59 Pac. Rep. 235 (husband and wife).

Washington. Work done at the request of the original contractor, held to be done at the request of the owner, under § 5900, Ballinger's Ann. Codes and Stats.: Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

Contract by man who subsequently marries owner; former held not responsible, under the circumstances of the case: Anderson v. Hilker, 38 Wash. 632, 80 Pac. Rep. 848.

Lien on community property: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712.

Husband and wife as parties to contract, community property: See Peterson v. Dillon. 27 Wash. 78, 67 Pac. Rep. 397.

[21] See §§ 523 et seq., post.

[22] See §§ 438 et seq., post.

[23] See §§ 572 et seq., post.

[24] See Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

[25] **Kerr's Cyc. Code Civ. Proc.,** § 1191.

[26] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 116, 65 Pac. Rep. 329.

[27] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

been held, in some jurisdictions, that it is not necessary for lien claimants to have had the statute in mind, and that they need not have had any intention to enforce a lien at the time of entering into the contract. This question, however, has never been discussed by the California courts.

§ 206. **Consent.** There must be consent, and a meeting of minds, as in the ordinary case of contracts.[28] Thus a written proposal for bids to do the work, and a written bid therefor by the contractor, and his bond for the performance of the work as provided for in the proposal, constitute the contract.[29]

Street improvement. Contract inchoate. Where it is necessary, in order to obtain a permit, that the owners of a majority of the frontage under a street-paving contract shall sign the contract, and only one has signed, the contract is inchoate until the required number sign.[30]

§ 207. **Same. Fraud. Mistake.** The same general principles applicable to fraud and mistake seem likewise applicable to the original contract, and it may be avoided for such

Colorado. As to entering into contract with statute in view, see Chicago L. Co. v. Newcomb, 19 Colo. 265, 74 Pac. Rep. 786, 789.

Montana. The lien, under the circumstances of the case, "did not arise from the contract under which the work was done; it arose from the work performed upon the property": Davis v. Alvord, 94 U. S. 545, 548, bk. 24 L. ed. 283.

Utah. "The contract for the construction of the building is entered into with a view of or with reference to the statute": Morrison, Merrill & Co. v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

Washington. It is not necessary that the lien be referred to in the contract, and the claimant need not have had it in mind at the time he agreed to perform the work: Stringham v. Davis, 23 Wash. 568, 63 Pac. Rep. 230.

[28] See Skym v. Weske Consol. Co. (Cal.), 47 Pac. Rep. 116.

Contract signed by one party: See Reedy v. Smith, 42 Cal. 245; Luckhart v. Ogden, 30 Cal. 547.

Montana. When the contract was not completed until the execution of a bond agreed to be given, no recovery could be had upon such contract, when the bond was not given: Hogan v. Shields, 20 Mont. 438, 52 Pac. Rep. 55.

Utah. Under a contract to furnish materials according to plans, specifications, and detail drawings, the latter become a part of the contract: Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986.

[29] Gilliam v. Brown, 126 Cal. 160, 162, 58 Pac. Rep. 466.

[30] Flinn v. Mowry, 131 Cal. 481, 484, 63 Pac. Rep. 724, 1006.

fraud and mistake.[31] Where, through misrepresentation of the defendant, plaintiff was induced to sign a contract he had never intended to sign, supposing he was signing one which, the day before, had been drawn up in lead-pencil, it may be avoided.[32]

§ 208. Same. Indefiniteness of contract. False reference to plans and specifications. If the contract is indefinite, it cannot be enforced.[33] Thus where, under the contract, the building is to be built according to specifications, they are an essential part of the contract, and are as material as the price paid or the terms of payment; but where the specifications are falsely referred to as annexed to the contract, the contract is void, and cannot form the basis of a recovery.[34] And where the written contract for the construction, as to the plans, drawings, and specifications, states that the same "are signed by the parties hereto and to be kept and

[31] See **Kerr's Cyc. Civ. Code,** §§ 1550, 1555-1589, and notes.

Erasure in a building contract : See Sullivan v. California R. Co., 142 Cal. 201, 204, 205, 75 Pac. Rep. 767.

Hawaii. Interlineations made after signing, held to render instrument void in toto: Apona v. Kamai, 6 Hawn. 707.

Idaho. Alteration of contract after delivery : Lane v. Pacific & I. N. R. Co., 8 Idaho 230, 67 Pac. Rep. 656.

Washington. Corrections and interlineations made and inserted before signing : See Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784.

[32] Cummings v. Ross, 90 Cal. 68, 71, 27 Pac. Rep. 62. See Beatty v. Mills, 113 Cal. 312, 45 Pac. Rep. 468. And it is probably true that where a subcontractor, material-man, or laborer agrees with the original contractor for more than he is entitled to, upon the understanding between them that it should be made out of the property, there would be such a fraud as would vitiate lien : Jewell v. McKay, 82 Cal. 144, 150, 23 Pac. Rep. 139. See also Verzan v. McGregor, 23 Cal. 339.

See "Conspiracy," § 380, post.

As to mistake in contract, see Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072, and Skym v. Weske Consol. Co. (Cal.), 47 Pac. Rep. 116.

Montana. Agreement among bidders on public work not to bid, void, as against public policy : Whalen v. Harrison, 26 Mont. 316, 67 Pac. Rep. 934.

[33] Rauer v. Fay, 110 Cal. 361, 42 Pac. Rep. 902; Rauer v. Welsh (Cal.), 42 Pac. Rep. 904. See Kreuzberger v. Wingfield, 96 Cal. 251, 255, 31 Pac. Rep. 109.

See chapter on "Variances," §§ 835 et seq., post.

[34] Worden v. Hammond, 37 Cal. 61, 64 (1862); Willamette S. M. Co. v. Los Angeles College, 94 Cal. 229, 233, 29 Pac. Rep. 629; Barker v. Doherty, 97 Cal. 10, 31 Pac. Rep. 1117; West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533.

remain in the office of the architect," and the same are not so signed, the contract is inchoate, and not complete, and cannot form a basis of a recovery.[35] And even where the contract refers to the plans and specifications only, and does not expressly make them a part thereof, where it appears that they are an essential part of the contract, a reference to them as being in the office of the architect leaves the contract, in its terms, essentially uncertain and indefinite.[36] In such cases, the contract is void as to all its terms and conditions.[37]

§ 209. **Consideration.** There must, of course, be a legal consideration for the contract.[38] Express or independent consideration is not necessary to the validity of the modification, either orally or in writing, of the original contract.[39] " The contract, when modified by subsequent oral agreement, is substituted for the contract as originally made, and the original contract attaches to and supports the modified contract." [40]

Agreed abandonment of contract requires no new or independent consideration.[41]

§ 210. **Ratification.** The common principles of ratification of contracts seem to be likewise applicable to this

[35] Donnelly v. Adams, 115 Cal. 129, 130, 46 Pac. Rep. 916; 127 Cal. 24, 59 Pac. Rep. 208. See West Coast L. Co. v. Knapp, 122 Cal. 79, 83, 54 Pac. Rep. 583; Blinn L. Co. v. Walker, 129 Cal. 62, 66, 61 Pac. Rep. 664.

[36] Greig v. Riordan, 99 Cal. 316, 320, 33 Pac. Rep. 913; Pierce v. Birkholm, 115 Cal. 657, 660, 47 Pac. Rep. 681. See Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412; Willamette S. M. L. Co. v. Los Angeles C. Co., 94 Cal. 229, 29 Pac. Rep. 629; Yancy v. Morton, 94 Cal. 558, 29 Pac. Rep. 1111.

[37] Donnelly v. Adams, 115 Cal. 129, 132, 46 Pac. Rep. 916.

[38] **Kerr's Cyc. Civ. Code,** §§ 1605-1615, and notes. See, generally, Gibson v. Wheeler, 110 Cal. 243, 245, 42 Pac. Rep. 810.

Compare: Dore v. Sellers, 27 Cal. 588, 593.

See also "General Nature of Lien," § 9, ante.

[39] Long v. Pierce Co., 22 Wash. 330, 61 Pac. Rep. 142, 147.

[40] Long v. Pierce Co., supra. See Bodders v. Davis, 88 Ala. 367, 6 So. Rep. 834; Thomas v. Barnes, 156 Mass. 581, 31 N. E. Rep. 683; Brown v. Everhard, 52 Wis. 205, 8 N. W. Rep. 725.

[41] Dyer v. Middle Kittitas Irr. Dist., 25 Wash. 80, 64 Pac. Rep. 1009, s. c. 40 Wash. 238, 82 Pac. Rep. 301.

species of contracts.[42] Thus a change in plans by architect must be ratified,[43] and the acts of engineer changing the plans of the improvement.[44]

§ 211. **Definition of "original contract."** Every contract made by an owner relating to the erection of a building is not necessarily an "original contract." It has already been pointed out that there are certain distinguishing features characteristic of the "original contractor,"[45] and it seems that his contract is an "original contract," under which other claimants may derive rights through him. The term "original contract" evidently is used in contradistinction to some subsequent and dependent contract.[46]

§ 212. **Same. Owner, laborer, and material-man.** It is obvious that the contract between the owner and his laborer or material-man cannot be related in the manner pointed out in the preceding section, and hence cannot be "an original contract."[47]

§ 213. **Same. Subcontractor's contract.** The contract of a subcontractor is not "an original contract," although he may create intermediate liens, and for that reason it is not required either to be in writing or to be recorded.[48]

[42] Ellison v. Jackson W. Co., 12 Cal. 542, 552.

As to waiver of provisions for benefit of owner, see "Certificate," §§ 238 et seq., post; "Performance," §§ 334 et seq., post.

[43] De Mattos v. Jordan, 15 Wash. 378, 46 Pac. Rep. 402.

[44] Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

[45] See §§ 45-65, ante.

[46] See McIntyre v. Trautner, 63 Cal. 429, 430.

[47] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637; Hinckley v. Field's Biscuit & C. Co., 91 Cal. 136, 139, 27 Pac. Rep. 594; Reed v. Norton, 90 Cal. 590, 599, 26 Pac. Rep. 767, 27 Id. 426. The language of Santa Monica L. Co. v. Hege, 119 Cal. 376, 378, 51 Pac. Rep. 555, "as the amount of the materials purchased from the plaintiff was less than one thousand dollars in value, the provisions of the code relating to the written contract and filing the same for record have no application," and similar expressions in Madera F. & T. Co. v. Kendall, 120 Cal. 182, 52 Pac. Rep. 304, 65 Am. St. Rep. 117, relative to the contract for materials, are misleading, although in the former case the court recognized the fact that a material-man is not an original contractor.

[48] Reed v. Norton, 90 Cal. 590, 599, 34 Pac. Rep. 333.

See "Subcontractor," §§ 66-76, ante.

A subcontract has been defined by the Oregon courts to be a contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service;[49] but this definition is open to criticism.

§ 214. **Same. Definition of "statutory original contracts" and "non-statutory original contracts."** The statutory provision[50] divides original contracts with reference to structures and for work in mines into two great classes: 1. Those in which the amount agreed to be paid thereunder exceeds one thousand dollars; and 2. Other original contracts. The first of the classes of original contracts, for the sake of definiteness and precision, will be designated as "statutory original contracts," and the second class as "non-statutory original contracts." These classes of original contracts will be considered hereafter in detail, the California and Colorado statutes being in this respect almost similar.

§ 215. **Same. Contract for street-work.** Under section eleven hundred and ninety-one of the Code of Civil Procedure, providing for the construction of sidewalks, etc., in incorporated cites, there is no statutory original contract, within the meaning of section eleven hundred and eighty-three of the same code.[51]

[49] Smith v. Wilcox, 44 Oreg. 325, 74 Pac. Rep. 708; rehearing denied, 75 Pac. Rep. 710.

[50] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

Colorado. The contracts referred to in Laws 1893, p. 316, § 1, which were required to be recorded, were those entered into between the reputed owner and a contractor, in which certain work is contracted to be done, and a certain price was contracted to be paid; and the failure to record a contract, not within the purview of the statute, did inure to the benefit of third parties, so as to give a lien: Maner v. Shull, 11 Colo. App. 322, 52 Pac. Rep. 1115.

[51] Kreuzberger v. Wingfield, 96 Cal. 251, 257, 31 Pac. Rep. 109.

CHAPTER XII.

BUILDING CONTRACTS (CONTINUED). CONSTRUCTION OF SAME. IN GENERAL.

§ 216. Construction of building contracts. In general.
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§ 216. Construction of building contracts. In general. The general principles of law relating to the construction of contracts are applicable to building contracts. They have their enunciation in the Civil Code of California.[1] These general principles will be here considered only so far as they serve to illustrate the decisions relating to the subject-matter treated in this work. In the following chapter will be treated in detail certain provisions frequently found in building contracts.

[1] **Kerr's Cyc. Civ. Code,** §§ 1635-1661, and notes. See also "Construction of Mechanic's-Lien Statutes," §§ 24-27, ante.

Oregon. See Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437 (where the contract called for common mortar, and the specifications for the use of cement in the mortar, the contractor is not liable when common mortar was used).

Contract and bond executed at the same time will be construed as one instrument: Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.

Utah. When the agreement is to furnish building material according to plans, specifications, and detail drawings, the plans, specifications, and detail drawings become a part of the contract: Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986.

Washington. Working details prepared by a city engineer become a part of a contract to grade and do other street-work according to certain plans of such engineer and under his directions, the plans not being attached to the contract, but this clause does not authorize such engineer to insert in the contract provisions prohibiting the

§ 217. Several contracts relating to the same matters. Where there are several contracts relating to the same matters between the same parties, made as parts of substantially one transaction, they are to be taken together.[2] Thus when, at the time of executing a contract for street-work, and as a part of the same transaction, a receipt for the difference between the amount as named in the contract and the price agreed between the parties in the contract, which contained a provision for the payment of the balance in instalments, the two instruments constitute the agreement between the parties, and are to be taken with the same effect as if the terms of both had been incorporated in one document and signed by both parties, and are to be construed, as far as practicable, so as to give effect to every part of each instrument.[3]

§ 218. Ambiguity or uncertainty in contract.[4] If the terms of a promise in an agreement are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it;[5] and the language of the

contractor from assigning the contract, fixing the time within which the work shall be completed, or prescribing a penalty for liquidated damages, or extra compensation for the work, or anything save the working details: Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 139, 421.

Where a bond is given to secure performance of a building contract, it is the contract, and not the bond, which is primarily to be construed, and the construction of the contract cannot be affected by the fact that the bond is given for its performance; it must be construed with reference to the intentions of the parties to the contract, as gathered from the instrument: Cowles v. United States F. & G. Co., 32 Wash. 120, 72 Pac. Rep. 1032, 98 Am. St. Rep. 838.

[2] **Arizona.** The rule is well settled, that when the terms and language of the contract are ascertained, in the absence of technical phrases, or the existence of latent ambiguities, rendering the subject-matter of the contract uncertain or doubtful, the office of interpreting its meaning belongs to the court alone: O'Connor v. Adams (Ariz.), 59 Pac. Rep. 105.

[3] Flinn v. Mowry, 131 Cal. 481, 63 Pac. Rep. 724, 1006; **Kerr's Cyc. Civ. Code,** § 1641, and note.

[4] Flinn v. Mowry, 131 Cal. 481, 63 Pac. Rep. 724 (judgment modified, 63 Pac. Rep. 1006).

See §§ 208, 216, ante.

[5] Laidlaw v. Marye, 133 Cal. 170, 179, 65 Pac. Rep. 391.

See **Kerr's Cyc. Civ. Code,** § 1649, and note.

contract is to be interpreted most strongly against the party who caused the uncertainty to exist; the promisor is presumed to be such party;[6] especially so, where the promisor draws the contract.[7]

§ 219. **Particular clauses. General intent.** The statutory rule is, that particular clauses of a contract are subordinate to its general intent.[8] There is an exception to this rule in those cases where the parties insert in their contract a clause to the effect that certain language used by them, which has become provincial, or has a peculiar and technical meaning in a particular trade, shall be taken to be used in a designated sense, when the designation thus made is clear and free from ambiguity.[9]

§ 220. **Entire and severable contracts.** Where the contract is to furnish, at a fixed rate per ton, all the iron couplings to be used in the construction of a pipe line, the contract is an entire contract.[10] And where the contractor

[6] Laidlaw v. Marye, 133 Cal. 170, 179, 65 Pac. Rep. 391.
See **Kerr's Cyc. Civ. Code,** § 1654, and note.
An instrument is to be interpreted most strongly against party bound by it: Flinn v. Mowry, 131 Cal. 481, 484, 63 Pac. Rep. 724, 1006.
See **Kerr's Cyc. Civ. Code,** § 1654, and note.

[7] Laidlaw v. Marye, 133 Cal. 170, 179, 65 Pac. Rep. 391.

[8] **Kerr's Cyc. Civ. Code,** § 1650, and note. See J. M. Griffith Co. v. City of Los Angeles (Cal. Sup.), 54 Pac. Rep. 383 (contract for constructing a sewer with a city; balance in excess of cost of repairs; change in contract respecting bands). See Gray v. La Société Française de B. M., 131 Cal. 566, 570, 63 Pac. Rep. 848.

[9] See Morrison v. Wilson, 30 Cal. 344, 348.

[10] First Nat. Bank. v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45.
Architect's contract for plans and specifications and for superintendence is an entire contract: See 4 Am. & Eng. Ann. Cas. 831, 7 Id. 617.
Colorado. The contract of a custodian of a mine to receive wages to be paid monthly, to be terminated by either party at any time, for the purpose of supporting a lien, is not a new hiring each month, but the labor is done under the original contract until it is ended; and, under the circumstances of the case, a lien did not attach: Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809.
As to entire contract, see Walling v. Warren, 2 Colo. 434.
Montana. Single contract on open continuous account: Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 417.
Where monthly accounts are rendered for supplies sold at various times, under no special agreement, the vendor not enforcing collection every month as a matter of grace, and relying on the supposed solvency of the vendee and the value of its concentrates, there is no running account, but each sale is made under a separate contract.

agreed to repair an old house, and to build a new addition thereto, to be attached to it, the old house to be turned partly

payment being due at the end of the month; such transactions being distinguishable from those wherein supplies are to be furnished where a reasonably, if not perfectly, definite amount of material could be counted upon, from time to time, under one general contract; but purchases made under no special agreement cannot be considered a continuing running account: A. M. Holter H. Co. v. Ontario M. Co., 24 Mont. 184; 61 Pac. Rep. 3, 7, 8. See Big Blackfoot M. Co. v. Bluebird M. Co., 19 Mont. 456, 48 Pac. Rep. 778.

As to when statute of limitations begins to run against mechanic's lien on a running account, see note 7 Am. & Eng. Ann. Cas. 947.

Where no time is fixed for payment in an agreement to furnish all services and materials for constructing a heating plant, to be paid for under a schedule of prices, a substantial performance of the whole contract is a condition precedent to liability under the express contract for the whole or any part of the consideration, and the fixing of the prices on the different items does not amount to a severance: Riddell v. Peck-Williamson H. & V. Co., 27 Mont. 44, 69 Pac. Rep. 241.

See Helena S. H. & S. Co. v. Wells, 16 Mont. 65, 40 Pac. Rep. 78, in which it was held that when all the items in the account relate to one transaction, and is between the same parties, it constitutes a continuous account, regardless of different times of delivery, and dates from the day of the last item. See also Alvord v. Hendrie, 2 Mont. 115.

Nevada. See Capron v. Strout, 11 Nev. 304.

Oregon. A contract for the construction of four buildings, for a fixed sum, to be made in semimonthly payments of seventy-five per cent of the labor performed and material used, the balance, or twenty-five per cent of the total contract price, to be paid thirty-three days after the buildings are completed, finished, delivered, and accepted, is entire and inseverable, although there is a later clause in the contract that the total sum shall be so segregated and divided in the payment thereof as to require fixed amounts for each of the structures: Wehrung v. Denham, 42 Oreg. 386, 71 Pac. Rep. 133.

One contract for four buildings entire, though in computing the price plaintiff estimated the cost of one building and multiplied it by the number of buildings: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

Utah. When all the items of an account relate to one continuous transaction between the same parties, although the goods were delivered on separate orders, and at different dates, within short intervals of each other, and the dealings of the parties indicate an expectation to continue such business relations, the transactions constitute a continuous running account, regardless of intervening irregular monthly balances in the account, which dates from the date of the last item delivered and relates back to the time of the first delivery of material; but if the materials are furnished for separate and distinct purposes, under distinct, separate contracts or orders, requiring cash payment, under circumstances tending to rebut dealings of a continuous nature, there would be no presumption of a continuous account, and, in the absence of an express contract, the right to a lien dates from the time of the commencement to furnish the materials for the different separate contracts on each separate order: Fields v. Daisy Gold M. Co., 25 Utah 76, 69 Pac. Rep. 528.

See also note 7 Am. & Eng. Ann. Cas. 947, 948.

Under a contract to run tunnel of fixed length, at a definite price, the owners agreeing "to receive said tunnel one hundred feet at a

round and placed on a new brick foundation to be laid under both the old house and the new addition, the contract is an entirety, where there is nothing in the contract by which the price to be paid for any part of the work or materials can be distinguished from that to be paid for any other part, and the word "building," in a condition in the contract, upon which the third instalment is to be paid, comprehends the new part, where the condition of the first payment is that the "old part" and not the "old building" shall be placed in position.[11]

A contract to bore two thousand feet of well-holes on oil-lands, under a scale of prices per foot, held, from a construction of the contract, that the plaintiff was to be paid at a fixed price per foot for each and every foot of hole sunk by him in an honest endeavor to carry out the contract, and he was entitled to payment for sinking a hole five hundred and eighty feet, which was abandoned by consent of the parties, by reason of a broken stem, or bit, upon which there was a cave of one hundred and fifty feet, preventing further drilling therein.[12]

Where a contractor agrees to timber a tunnel in a workmanlike and practical manner so as to protect against outward and inward pressure, and he is controlled in this by the further provisions that the tunnel is to be constructed according to the specifications of the engineers of the owner, and that the material for timbering is to be furnished by the owner, notwithstanding that the contract is indivisible and entire, the contractor is not responsible for caving

time, and to pay" the contractor "one thousand dollars upon the completion of such one hundred feet," and the second hundred feet were not paid for, the contractor, abandoning the work, can recover for that already done, the payment of the one thousand dollars upon the completion of each hundred feet being a condition precedent to the complete performance of the work: Bennett v. Shaughnessy, 6 Utah 273, 22 Pac. Rep. 156.

Washington. So where the contract of an architect was to draw plans and superintend the construction of the building to completion, the fact that payment was to be made by the month does not affect the entirety of the contract: Nason v. Northwestern M. & P. Co., 17 Wash. 142, 49 Pac. Rep. 235.

As to architect's contract, see 4 Am. & Eng. Ann. Cas. 836, 7 Id. 617.

[11] Clark v. Collier, 100 Cal. 256, 258, 34 Pac. Rep. 677.

[12] Cook v. Columbia O. A. & R. Co., 144 Cal. 670, 674, 78 Pac. Rep. 287.

of the tunnel, caused by the failure of the owner to furnish suitable timbers and by the mistake of the engineers as to the strength of material.[13]

Contract to grade railroad. Where a contract provides for the grading of a section of a railroad and the doing of the masonry work, and all things necessary for placing the cross-ties and iron equipment on the track, and the owner was to pay the contractor a certain price for the work, to be paid in instalments as the work progressed, at amounts to be fixed on estimates of the chief engineer of the company, the contract is entire, notwithstanding the provision for payments from time to time as the work progressed.[14]

§ 221. **Dependent and independent promises.** Where mutual promises go to the whole consideration on both sides, they are concurrent and dependent; for instance, the promise of the contractor to protect the building from liens, and that of the owner to pay seventy-five per cent of the contract price during the progress of the building, upon certificates of the architect, and the balance upon its completion, are mutual and dependent, and go to the whole consideration.[15] But an agreement of the owner to pay the contract price thirty-five days after the completion of the contract is independent of the engagement of the contractor to keep the structure in repair for one year after such completion.[16]

§ 222. **Joint and several contracts.** Where payment in full is made to one of two joint contractors, who has a right

[13] McConnell v. Corona City W. Co., 149 Cal. 60, 63, 85 Pac. Rep. 929.

[14] Cox v. Western Pac. R. Co., 44 Cal. 18, 28, s. c. 47 Cal. 87, 89. See Cox v. McLaughlin, 52 Cal. 590, 595, 54 Id. 605, 63 Id. 205, 76 Id. 60, 62, 18 Pac. Rep. 100, 9 Am. St. Rep. 164; Atlantic & D. R. Co. v. Delaware C. Co., 98 Va. 503, 508, 37 S. E. Rep. 13.

[15] Ernst v. Cummings, 55 Cal. 179, 184.

Montana. Breach of a subsequent independent contract, so construed, held not to be a breach of the antecedent contract: Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

Oregon. The modern tendency of courts, when a matter of construction is left in doubt, is to prefer the one which renders mutual promises or agreements dependent rather than independent: Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.

[16] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 67, 40 Pac. Rep. 45.

to receive it, a separate cause of action cannot accrue to the other; but where the work of each can easily be done separately, and both receive payment for what he actually did in running a tunnel, at a certain price per foot, if the defendant treats the contract as several, and measures the work of one, and agrees to pay him as soon as the other finishes the work, a separate cause of action for such work is created, and the defendant cannot shield himself from liability by payment to the other party.[17]

§ 223. Contract explained by circumstances. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.[18] The contract must be considered as a whole, and regard must be had to the situation of the parties, the surrounding circumstances, and the object to be accomplished, in order to arrive at the intention of the parties.[19]

Where the contract provided that the contractor was to build a dam " in the year 1867, or as soon thereafter as practicable," it will not be construed to mean " that which can be

[17] Sullivan v. Grass Valley Q. M. & M. Co., 77 Cal. 418, 421, 19 Pac. Rep. 757.

See **Kerr's Cyc. Civ. Code,** §§ 1659, 1660, and notes.

[18] **Kerr's Cyc. Civ. Code,** § 1647, and note.

[19] Far West O. Co. v. Witmer Bros. Co., 143 Cal. 306, 77 Pac. Rep. 61 (clause construed as an independent covenant).

Washington. Where a contract provided that any improper building materials may be condemned, materials accepted in the construction of the building fixes the liability: Childs L. & Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373.

Where the contract for the construction of a ditch provided for the removal of "earth and gravel" between certain points, the removal of "cement-gravel" was held to be within the terms of the contract, although attended with greater difficulties, it appearing that at the time of the execution of the contract the contractors knew or might have known that the work where the "cement-gravel" was encountered might be more difficult to perform than elsewhere: Wilkin v. Ellenburgh W. Co., 1 Wash. 236, 24 Pac. Rep. 460.

Where a building contract authorized the owner to construe the terms thereof, and made his construction after the completion of the work, and the contract in regard to the plastering provided that the lathing should receive two coats of plaster and "carpet float for calcimining walls," the owner was authorized to construe the provision as requiring three coats of plaster, the contractor not urging a waiver of the owner's right so to construe the contract by silence, or failure to object at the time the plaster was placed on the walls: Sweatt v. Hunt, 42 Wash. 96, 84 Pac. Rep. 1.

accomplished by human means"; its meaning must be ascertained from the nature of the contract, the difficulties to be overcome, and the importance to the plaintiff of an early completion. Each case is governed by its own circumstances.[20]

§ 224. **Reasonable stipulations, when implied.** Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.[21] So in the absence of a provision in the contract as to how windows are to be placed, there is impliedly in the contract an agreement that it shall be done in a workmanlike manner.[22]

Where a public body contracts to provide material, it is implied that the material shall be of proper strength and suitable for the purpose, and in such case no presumption will be indulged that there is an uncertainty, under the statute [23] providing that an uncertainty in a contract between a public body and a private individual shall be presumed to be caused by the latter.[24]

§ 225. **Same. Time of performance unspecified.** If no time is specified for the performance of an act required to be per-

[20] Reddy v. Smith, 42 Cal. 245.

[21] **Kerr's Cyc. Civ. Code,** § 1655, and note.

Colorado. A contract for the erection of a building, "of the best lumber," merely, must be construed to mean the best lumber of which buildings were ordinarily constructed at that place: McIntyre v. Barnes, 4 Colo. 285.

Montana. A building contractor's agreement to "furnish all material and do all labor" must be interpreted to mean that he will pay for the same: Cockrill v. Davie, 14 Mont. 131, 35 Pac. Rep. 958.

[22] Schindler v. Green (Cal. App.), 82 Pac. Rep. 631. This point was eliminated in the decision on hearing in the supreme court: 149 Cal. 752, 87 Pac. Rep. 626.

Idaho. Where a railway company contracts to fence the edge of pit-ground on both sides of its track, and to construct a switch, but does not specify how it shall be done, the law implies a promise to do it in the usual way, and that it shall be complete and effectual for the purpose intended: Lane v. Pacific & I. N. R. Co., 8 Idaho 230, 67 Pac. Rep. 656.

[23] **Kerr's Cyc. Civ. Code,** § 1564.

[24] McPherson v. San Joaquin County (Cal., March 24, 1899), 56 Pac. Rep. 802.

formed, a reasonable time is allowed.[25] Likewise as to enlargement of time to perform;[26] and what is such reasonable time is a question of law for the court.[27]

§ 226. **Warranty.** Where a contract provides that when the cut of a ditch is sufficient in capacity and grade to carry all the waters of a creek, the contractor should receive compensation, and he guarantees that all such waters should run through the cut for a certain period from the completion of the work, such guaranty is in the nature of a warranty, and he may recover without waiting for the end of such period, and then show that the ditch had carried all the water at all times.[28]

Warranty of design or plan under express specifications. Where a contract provides full specifications as to the manner of construction of an elevator and as to material to be used therein, a clause that the work should be done in a "first-class, workmanlike manner," relates merely to the work as specified in the contract, and there is no warranty that the specifications, or the plan or design of the elevator,

[25] **Kerr's Cyc. Civ. Code,** § 1657, and note. See Luckhart v. Ogden, 30 Cal. 547; Hannan v. McNickle, 82 Cal. 122, 23 Pac. Rep. 272.

Colorado. Where no time is specified for the completion of the building, it will be presumed that a reasonable time was intended: Walling v. Warren, 2 Colo. 434.

Washington. Brodek v. Farnum, 11 Wash. 565, 40 Pac. Rep. 189.

[26] Luckhart v. Ogden, 30 Cal. 547.

[27] Luckhart v. Ogden, 30 Cal. 547.

Where the law defines what is a reasonable time, or the question can be determined by application of rule to construction of instrument, question is one for the court: See Railway Co. v. Birnie, 59 Ark. 78, 79; Earnshaw v. United States, 146 U. S. 60, 67, bk. 36 L. ed. 887, 889, 13 Sup. Ct. Rep. 14.

Jury to draw inference from facts in all other cases: See Luckhart v. Ogden, supra; Morris v. Wibaux, 159 Ill. 627, 646, 43 N. E. Rep. 837.

See notes 17 Am. Dec. 545; 69 Am. Dec. 457.

Washington. Where certain lines and levels for the work were to be furnished on a certain date before the date of the contract, but were not so furnished, a penal clause for delay was ineffectual, for the reason that by entering on the work after the failure to comply with this condition precedent, the contractor merely obligated himself to complete the building within a reasonable time: Long v. Pierce Co., 22 Wash. 330, 61 Pac. Rep. 142, 148, **distinguishing** Reichenbach v. Sage, 13 Wash. 364, 43 Pac. Rep. 354.

[28] Gilliam v. Brown, 116 Cal. 454, 48 Pac. Rep. 486.

are first-class, or that it is suitable for the purposes intended.[29]

§ 227. Construction of statutory original contracts. Penalty. Statutory original contracts, and alterations thereof, under the California statute, must conform substantially to the provisions of section eleven hundred and eighty-four,[30] relating to the time and manner of payments. And in case of a material non-conformity of the building contract with the statute in parts not rendering it void, the owner becomes subject to a penalty, which every reasonable intendment must be made to avoid;[31] and a dereliction must be clearly shown to have occurred.[32]

§ 228. Instances of construction of contracts.[33] Under a contract for the construction of a sea-wall of fixed length,

[29] Bancroft v. San Francisco Tool Co., 120 Cal. 228, 231, 52 Pac. Rep. 496.

[30] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[31] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431; West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533. See Reed v. Norton, 90 Cal. 590, 26 Pac. Rep. 767, 27 Pac. Rep. 426; Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072.

"Construction of Statutes," §§ 24-27, ante.

Colorado. Where, in proceedings under a mechanic's-lien statute, the question concerns only the right of the contractor to assert a lien, an alleged prohibitory clause in his contract must be construed strictly, and if the language used be of doubtful import, should be construed in his favor; in other words, the prohibition must be clearly expressed. This rule applies with additional and far greater force when the original contractor's contract is invoked to cut off the lien rights of subcontractors, laborers, and material-men, who were not parties to it: Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

[32] West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533.

[33] **Construction of contract as to delivery of order:** Pacific R. M. Co. v. English, 118 Cal. 123, 128, 50 Pac. Rep. 383.

Construction of contract as to laying floor: See Laidlaw v. Marye, 133 Cal. 170, 65 Pac. Rep. 391.

Arizona. Where a written contract, among other things, provides for certain payments for "all brick laid in the walls of the building now being erected," etc., and for laying them according to plans to be furnished by the architects, and stating that the same were not then completed, and the contract includes the brickwork on a kitchen, an oral agreement for extra payment for constructing the kitchen walls cannot be sustained. The construction of a written contract cannot be submitted to the jury: O'Connor v. Adams (Ariz.), 59 Pac. Rep. 105.

Colorado. Where a contract provided for sinking a mining-shaft a specified additional depth, and eighteen feet from the point of the commencement of the work the shaft was sunk off and away from

at certain prices for materials used, the engineer's estimates of the qualities needed, as stated in the notice, bid, and speci-

the vein of ore, in the country-rock, there is no agreement to sink on the vein, especially where the owner construes the contract by paying, without objection, the amount due, when the shaft was at a lower depth: Buckeye M. & M. Co. v. Carlson, 16 Colo. App. 446, 66 Pac. Rep. 168.

Idaho. Where a contract provides for a fixed penalty for delay, and for written applications to architect for extensions of time for completion of the building, and delays are caused by the architect, as agent of the owner, who leads the contractors to believe that a written application would not be required, such written application is waived, and no deduction from the contract price because of such delays will be made: Huber v. St. Joseph's Hospital, 11 Idaho 631, 83 Pac. Rep. 768.

Montana. Contract authorizing railroad company to stop any of the work, or to diminish the force employed by the contractor, and requiring contractor to do so, construed not to allow the railroad company to stop the whole work temporarily, to be resumed later on, or to cancel contract arbitrarily without cause: Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

Written contract to furnish certain machinery at a fixed price, and also "all castings required, in addition," at a stated rate, was construed to refer to the castings for the machinery described, and not to castings subsequently purchased under other contracts: A. M. Holter Hardware Co. v. Ontario M. Co., 24 Mont. 184, 61 Pac. Rep. 3, 7.

Oregon. Where a contractor was to keep the building free from liens for a period beyond the time when the last payment was due, freedom of the structure from such liens is a condition precedent to such payment: Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.

Washington. Where a contract provides that "no alterations may be made in the work, except on the written order of the architect," a mere change in the parties doing the work does not require such order: Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. Rep. 25, 26.

Where contract requires the contractor to furnish the cut for an excavation "according to stakes set out by the engineer, and to his satisfaction," it refers to stakes then in place: Olsen v. Snake River V. R. Co., 22 Wash. 139, 60 Pac. Rep. 156.

Where the contract provided that all the walls should be built of "Wilkeson stone," and it appeared that a certain quarry was the only one opened at the time the contract was made, the contractor has the right to procure the stone wherever a suitable quality is to be found, as the specifications describe the quality and grade of stone, and not the particular quarry: Long v. Pierce Co., 22 Wash. 330, 61 Pac. Rep. 142, 151.

A contract requiring payment to be made only for materials actually used in the construction of a canal, does not entitle the contractor to be paid for materials not in place, but merely strung along the line of the canal: Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301.

Oral notice to the contractor is insufficient where the contract requires written notice of defects: Sweatt v. Hunt, 42 Wash. 96, 8 Pac. Rep. 1.

Contract for preliminary work in clearing right of way of railroad, construed as limiting the number of cords of wood to that mentioned in the contract: Eastham v. Western Const. Co., 36 Wash. 7, 77 Pac. Rep. 1051.

fications, do not require the purchase of or payment for the exact estimated quantities of materials, whether used or not, but only for the materials actually used in the work, and it is of no consequence if there is a mistake in such estimates.[34]

Where, by the terms of a lease of oil-wells, the lessee agreed to erect all necessary machinery, and furnish at its own cost all materials necessary to carry on the work, and all labor employed in the development and production, including all labor and material in erecting and maintaining fixtures, the lessor agreeing to pay half of the cost of drilling, casing, and pumping all wells of a certain depth which did not produce a fixed amount of oil per day for a stated period, the lessor was properly chargeable with half of the expense of all the preliminary work of preparing the ground, erecting the derrick, placing and connecting the engine, drilling-rig, and the entire cost of the well from the time the first work was begun on the ground until the machinery was removed, when it was abandoned, including the expense of removal, and also half of the reasonable value of the use of the machinery used, owned, and furnished by the lessee.[35]

Water company contracting to supply water, but relieved from liability in case such delivery should be lawfully or forcibly restrained, or prevented by hostile diversion or obstruction, is not liable when non-delivery is caused by reason of the filling up of its canal by the road authorities and by injunction.[36]

Original contractor, having furnished the materials and performed the work up to a certain stage, when he abandons it, is conclusively bound to know of all defects in the existing materials and workmanship, and is bound, under his contract, to correct them; but a new contractor, who undertakes to finish the contract after the abandonment, is not bound to know of defects that are not known or apparent to a skilful observer when he entered upon his contract, and the correction of such defects is not covered by his con-

[34] Hackett v. State, 103 Cal. 144, 37 Pac. Rep. 156.

Term "more or less," construction of: See Hackett v. State, supra.

[35] Far West O. Co. v. Witmer Bros. Co., 143 Cal. 306, 77 Pac. Rep. 61.

[36] Fresno M. Co. v. Fresno C. & I. Co., 126 Cal. 640, 59 Pac. Rep. 140.

tract.[37] Where a party agrees to erect a building, and certain amounts are to be paid in instalments as the building progresses, and at its completion he is "to take the second party's note, . . . payable twelve months after date, or before if the party of the second part wishes to do so," the clause, "if the party of the second part wishes to do so," relates to the time when the note shall be payable, and the second party has not the option of giving the note.[38]

Under a contract containing clauses for deviations from the specifications, by the contractor, to be made at the owner's request, and particularly for "omissions from said contract," which "shall in no way affect or make void the contract, but shall be added to or deducted from the amount of the contract, as the case may be, by a fair and reasonable valuation," the meaning is clear, without the aid of extrinsic evidence, and such "omissions" do not refer to something which is to be entirely left out of the building, and not to be put there by the contractor or owner, and which the owner might elect to take off the contractor's hands and perform or finish himself.[39]

[37] Long Beach School Dist. v. Dodge, 135 Cal. 401, 406, 67 Pac. Rep. 499.

[38] O'Connor v. Dingley, 26 Cal. 11, 18, 3 West Coast Rep. 197.

[39] Snaver v. Murdock, 36 Cal. 293, 296.

CHAPTER XIII.

BUILDING CONTRACTS (CONTINUED). COMMON CLAUSES PECULIAR TO BUILDING CONTRACTS. IN GENERAL.

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§ 229. **Scope of chapter.** In this chapter will be considered those clauses which are usually found in building contracts, their construction and effect.

§ 230. **Arbitration clause. California.** Persons capable of contracting may submit to arbitration any controversy which

might be the subject of a civil action between them, except a question of title to real property in fee or for life; but this qualification does not include questions relating merely to the partition or boundaries of real property.[1] The submission to arbitration must be in writing, and may be to one or more persons.[2] It may be stipulated in the submission that it may be made an order of superior court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside, and the statutory proceedings be had thereon.[3] But an agreement to submit a matter to arbitration will not be specifically enforced.[4]

§ 231. **Same. Agreement to arbitrate not final.** It now seems to be the settled law that an agreement to refer a case to arbitration will not be regarded by the courts, and they will take jurisdiction and determine the dispute between the parties, notwithstanding an agreement to refer the matter to arbitrators.[5]

§ 232. **Same. When procuring award condition precedent to recovery.** But when the agreement is that the covenantor shall pay such sum, and only such sum, as shall be determined by arbitrators, procuring an award is as clearly a condition precedent to an action, as if the parties had added the clause, "and no action shall be maintainable until after the award of the arbitrators";[6] and this is so regarding a

[1] **Kerr's Cyc. Code Civ. Proc.,** § 1281, and note.
[2] **Kerr's Cyc. Code Civ. Proc.,** § 1282, and note.
[3] **Kerr's Cyc. Code Civ. Proc.,** §§ 1283-1290, and notes.
[4] **Kerr's Cyc. Civ. Code,** § 3390, subd. 3, and note.
[5] **Oregon.** See Savage v. Glenn, 10 Oreg. 440.
[6] See California cases in next note, post.

Idaho. Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals is void; so held with reference to a provision for referring disputed matters to arbitration, the decision to be final, the distinction from cases decided in other states being that in this contract the award was to be final: Huber v. St. Joseph's Hospital, 11 Idaho 631, 83 Pac. Rep. 768 (under § 3229, Rev. Stats.).

Montana. Under § 2245, Civ. Code of 1895, the provision of a contract by which the construction to be placed on it by the agent of one of the parties should be final, without a right of appeal to the courts, held void: Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

building contract containing a clause that if any dispute should arise respecting the true value of the extra work, the same should be valued by arbitration.[7]

This rule is especially applicable where there is no request or attempt to arbitrate, or where no excuse is shown for not having made such request or attempt.[8]

§ 233. Same. Distinction between two classes of cases. The distinction between the two classes of cases mentioned in the preceding section is, that, in one case, the parties undertake by an independent covenant or agreement to provide for the adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts; and in the other, they merely, by the same agreement which creates the liability and gives the right, qualify the right, by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts or values ascertained, and this is made a condition precedent, either in terms or by necessary implication.[9]

Oregon. Right to have alterations valued by arbitrators waived by not pleading it in abatement: Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437.

Washington. Where a building contract provided that in case of any doubt or question as to the plans and specifications, the decision of the architects, "being just and impartial," should be conclusive, and, prior to the commencement of the work, the architects, unknown to the contractor, delivered to the county a bond to keep the cost of the building below a certain figure, the decision of the architects is not conclusive: Long v. Pierce Co., 22 Wash. 330, 61 Pac. Rep. 142, 151 (as to extra work).

A submission to arbitration without protest on the part of the owner that the contractor has lost his right to object is a waiver thereof: Brown's Exrs. v. Farnandis, 27 Wash. 232, 67 Pac. Rep. 574.

[7] Holmes v. Richet, 56 Cal. 307, 312, 38 Am. Rep. 54; Cox v. McLaughlin, 63 Cal. 196, 207, 14 Pac. Rep. 98; Scammon v. Denis, 72 Cal. 393 ("no request or offer" to submit to arbitration); Loup v. California So. R. Co., 63 Cal. 97, 101 (estimate by engineer of the value of the work done). See, as to evidence of referee not being conclusive, McFadden v. O'Donnell, 18 Cal. 160.

[8] Gray v. La Société Française de B. M., 131 Cal. 566, 571, 63 Pac. Rep. 848 (see this case for distinction between arbitration as to the value of extra work and whether extra work falls within arbitration clause).

See "Extra Work," § 249, post.

[9] Holmes v. Richet, 56 Cal. 307, 312, 38 Am. Rep. 54; Loup v. California So. R. Co., 63 Cal. 97, 102. See California M. E. Church v. Seitz, 74 Cal. 287, 292, 15 Pac. Rep. 839; Castagnino v. Balletta, 82 Cal. 250, 260, 23 Pac. Rep. 127; and Downing v. Graves, 55 Cal. 544, 550.

§ 234. Same. Submission to arbitration revocable. A stipulation for submitting the matters in controversy to arbitration, which contains no provision by which an order of court can be made upon it, and which is not made an order of court, may be revoked at any time before the award is made.[10]

§ 235. Same. Good faith and open dealings of arbitrators. The arbitrator or umpire is required to act in the highest good faith[11] as to the matters within the arbitration

Colorado. See Denver, S. P. & P. Co. v. Riley, 7 Colo. 494, 4 Pac. Rep. 785.

Idaho. And where it is agreed that payments shall be made upon estimates of a certain engineer, a party, to recover more, must allege and prove fraud or mistake: Thompson v. Bradbury, 5 Idaho 760, 51 Pac. Rep. 758.

Montana. A clause in a contract, that the engineer of a railway company shall be the arbiter as to whether certain work has been done in accordance with the contract, is valid: Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

Oregon. See Meyers v. Pacific Cons. Co., 20 Oreg, 663, 27 Pac. Rep. 584.

Washington. Arbitration condition precedent to action, where plaintiff has not offered to arbitrate, or has refused to do so: Childs L. & M. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373; Zindorf Const. Co. v. Western A. Co., 27 Wash. 31, 67 Pac. Rep. 374; Hughes v. Bravinder, 9 Wash. 595, 38 Pac. Rep. 209, s. c. 14 Wash. 304, 44 Pac. Rep. 530; Van Hook v. Burns, 10 Wash. 22, 38 Pac. Rep. 763. And see De Mattos v. Jordan, 15 Wash. 378, 46 Pac. Rep. 402; Van Horne v. Watrous, 10 Wash. 525, 39 Pac. Rep. 136; Skagit Co. v. Trowbridge (Wash.), 64 Pac. Rep. 901; School Dist. v. Sage, 13 Wash. 352, 43 Pac. Rep. 341.

Where a contract provides that, in case of delay in furnishing certain material, the owner may determine the amount of damages therefor, and have the matter submitted to arbitrators, to be selected by the parties, in case the claim be disputed by the contractor, where such contractor takes no steps to arbitrate, and the owner fixes the amount of the damages from delay, and informs the contractor, defenses to the claim of damages cannot be set up by the contractor in a suit for the price, when the same could have been arbitrated, and he can recover only any amount due in excess of the damages so fixed: Childs L. Co. v. Page, 32 Wash. 250, 73 Pac. Rep. 353, 28 Wash. 128, 68 Pac. Rep. 373.

[10] Sidlinger v. Kerkow, 82 Cal. 42, 46, 22 Pac. Rep. 932. See McFadden v. O'Donnell, 18 Cal. 160.

Kerr's Cyc. Code Civ. Proc., § 1283, and note.

Washington. But see Hughes v. Bravinder, 9 Wash. 595, 38 Pac. Rep. 209.

See § 249, post.

[11] **Idaho.** Where a contract for railroad construction provides that the engineer of the company shall act as umpire, and shall finally decide the amount and character of the work and material furnished, the company is bound to employ a thoroughly competent and honest engineer, and see that he performs his duties fairly and honestly: Spaulding v. Cœur D'Alene R. & N. Co., 5 Idaho 528, 51 Pac. Rep. 408.

clause;[12] yet where the contractor was to receive a fixed price for his work, whether the variations which the engineer, under permission of the contract, might make should make the work heavier or lighter, and a secret agreement

Montana. Where a contract names the chief engineer as arbitrator, whose judgment shall determine that an exigency has arisen to justify the termination of the contract, it is implied that this judgment shall be exercised in good faith: Wortman v. Montana C. R. Co., 22 Mont. 266, 56 Pac. Rep. 316, 320.

Washington. While arbitrators are not required to proceed with the formalities of a court, yet they must proceed in such manner as to give a full hearing to each of the parties, not only upon the several items of the claim presented by himself, but also upon the claim of his adversary, and upon the evidence adduced in support of that claim. This they cannot do without hearing the party and his witnesses in the presence of the opposing party. Unless this right is waived by the party, either in the agreement of submission, or by conduct amounting to a waiver, the award made under such circumstances is clearly void. The arbitrators should receive no communication from either party without letting the other party know; they should make no inquiries from the witnesses on either side, no matter how immaterial the point, after the hearing is closed. A departure from the strict rule of dealing equally with both sides will be fatal to the award: Brown's Exrs. v. Farnandis, 27 Wash. 232, 67 Pac. Rep. 574.

The court will set aside an arbitration as to the amount due for materials and extra work, and for delay in completing a building contract, where the arbitrators, owing to an altercation between the parties, respecting the matter in controversy, directed them to leave, the altercation not being so serious that they could not have been heard, and they not being given an opportunity to be heard, as the arbitrators were not sufficiently informed in the premises, and the award was unfair, although not fraudulent: McDonald v. Lewis, 18 Wash. 300, 51 Pac. Rep. 387.

Meeting before and presenting claim to arbitrator: See Hughes v. Bravinder, 9 Wash. 595, 38 Pac. Rep. 209.

Alterations. Value to be computed by architect. Where the value of any alterations was to be computed by the architect, under the terms of the contract, and might be referred to arbitrators, if the contractor was dissatisfied with architect's award, and it was so referred, the parties being heard separately by the arbitrators, who permitted them to explain their claims, but did not pass on the merits of demands for some alterations, as the contractor had failed to object to the architect's computations when they were submitted to him with the order for the alterations, the contractor's right to dissent was not waived, because not done when such computations were submitted to him with such order, and the award was not conclusive, and could be reopened by evidence in a suit against the contractor on his bond: Brown's Exrs. v. Farnandis, 27 Wash. 232, 67 Pac. Rep. 574.

[12] **Washington.** Where a provision for arbitration relates to the increased or decreased cost occasioned by alterations, reviewing the architect's certificate in the matter of the extension of time, and damages sustained by either party on account of delay, the owner may recover from the contractor the expenses incurred in completing a foundation-wall and repairing a cave in the street, caused by excavating the foundation, they not being within such provision: Main Inv. Co. v. Olsen (Wash.), 86 Pac. Rep. 1112.

was made with the engineer to give him a share of the profits to make such variations, whenever possible, as would make the work less expensive, without doing anything to the disadvantage of the railroad company employing the engineer, the contractor may recover the reasonable value of his work, although such arrangement was improper.[13]

§ 236. **Estimates.**[14] This is somewhat involved in the matter contained in the preceding sections. Where the method of measurement of the cubic contents of an embankment is

Where liquidated damages for delay in completion are provided for, and that alterations should not be made except on a written order of the architect, and when so made the value of the work added or omitted should be computed by the architect, and the amount so ascertained be added to or deducted from the contract price, and in case of dissent from such award by either party, the valuation of the work added or deducted should be referred to three disinterested arbitrators, to be appointed in a certain manner, and if the contractors should be delayed by the owner or for other reasons specified, the time of completion should be extended for the same period, but claim for such extension to be made to the architect in a certain manner, with the right of appeal to arbitration, submission to the architect or arbitrators of the damages caused by the failure of the contractors to complete the building within the prescribed time was not required: Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. Rep. 25.

[13] Cox v. McLaughlin, 76 Cal. 60, 64, 18 Pac. Rep. 100, 9 Am. St. Rep. 164.

[14] **Estimates:** See Valley L. Co. v. Struck, 146 Cal. 266, 271, 80 Pac. Rep. 405.

Approval and assignability of estimates: See Newport W. & L. Co. v. Drew, 125 Cal. 585, 58 Pac. Rep. 187.

Estimates by member of board of trustees, who is the president of a bank, which is the assignee of an instalment: See Newport W. & L. Co. v. Drew, 125 Cal. 585, 591, 58 Pac. Rep. 187.

Utah. Fraudulent estimates: See Garland v. Bear L. & R. W. & Irr. Co., 9 Utah 350, 34 Pac. Rep. 368.

Washington. Where a contract specially provides that the engineer should define the meaning, intent, and purport of the plans and specifications, and that his decision in all cases should be final, the clause does not confer on the engineer the power to vary the meaning of plain terms used in the contract, and his estimate as to the work done and materials used is not conclusive, although it may be prima facie evidence thereof, where there is no provision in the contract making it conclusive evidence: Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301.

In an action by the constructor of an irrigation-ditch for a balance due under a contract requiring the estimates of work done as returned by the engineer to be approved by the board of directors of the district, such approval was not an essential to recovery, where the failure to approve was purely arbitrary: Dyer v. Middle Kittitas Irr. Dist., 25 Wash. 80, 64 Pac. Rep. 1009, s. c. 40 Wash. 238, 82 Pac. Rep. 301.

sufficiently accurate for practical purposes, although not according to the exact formula, and is shown to be used by some engineers, under the claim that the difference between such method and the exact formula is not sufficient to pay for making the extra calculation, the court was held justified in accepting the computation.[15]

§ 237. Liquidated damages.[16] Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation is determined in anticipation thereof, is to that extent void,[17] except that the parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.[18] So a clause in a bond of a contractor, that if the building was not completed by a certain day, the sureties should pay the owner a certain amount as liquidated damages for each day's delay, is not alone enough, without a showing that it was impracticable or extremely difficult to fix the actual damages on account of the delay, to enable the owner to recover such liquidated damages.[19]

[15] Scanlan v. San Francisco & S. J. R. Co., 128 Cal. 586, 61 Pac. Rep. 271.

[16] **As to liquidated damages,** see Pogue v. Kaweah P. & W. Co., 138 Cal. 664, 72 Pac. Rep. 144.

[17] **Kerr's Cyc. Civ. Code,** § 1670, and note.

[18] **Kerr's Cyc. Civ. Code,** § 1671, and note. See also Long Beach City School Dist. v. Dodge, 135 Cal. 401, 405, 67 Pac. Rep. 499.

[19] Patent Brick Co. v. Moore, 75 Cal. 205, 208, 16 Pac. Rep. 890; Muldoon v. Lynch, 66 Cal. 536, 6 Pac. Rep. 417.

Colorado. Under a contract for the erection of eight houses for twenty-one thousand two hundred dollars, to be completed within a certain time, provided that if the contractor "fail to complete the work upon any of said houses, . . . it shall pay . . . the full sum of five dollars per day for each and every day thereafter that the work upon either of the said houses shall remain unfinished, . . . as liquidated damages," the payment is not five dollars per day for each house: Denver L. & S. Co. v. Rosenfeld Const. Co., 19 Colo. 539, 36 Pac. Rep. 146.

Washington. Stipulations for liquidated damages are generally inserted in building contracts for the sole purpose of avoiding the possible or probable difficulty of proving the exact damage that may result from a breach of the contract: and where such agreements are deliberately and intentionally entered into, they are binding upon the parties, and will be upheld by the courts: but it sometimes happens that provisions apparently for liquidated damages

§ 238. **Certificates.**[20] The code itself does not require any acceptance by the architect, nor a certificate of such acceptance, and makes no reference to that subject.[21]

The contract often provides for the certificate of an architect or other supervising person as to the state of the work, and such may be a condition precedent to payments.[22] Thus where the contract provides for estimates by an engineer, during the progress of the work, as to its amount and value according to the contract price, and that on completion of

are really nothing but stipulations for penalties or forfeitures, against which the courts will, in proper cases, grant relief. While courts of equity afford relief against penalties, yet they cannot relieve against liquidated damages: Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. Rep. 25, 30. See Reichenbach v. Sage, 13 Wash. 364, 43 Pac. Rep. 354, 52 Am. St. Rep. 51; Jennings v. McCormick, 25 Wash. 427, 65 Pac. Rep. 764. Also Young v. Gaut, 69 Ark. 114, 61 S. W. Rep. 372.

But where a contract provides for ten dollars per day of delay as damages, it was said: "There has been some conflict of authority on this question, each case, however, necessarily being decided with reference to its own particular circumstances and the particular language of the contract. We are satisfied, however, that the overwhelming weight of authority sustains the contention that this contract provides for liquidated damages. There is nothing inequitable in the terms of this provision. The amount does not seem to us to be excessive or unreasonable. It does not provide for the payment of a sum in gross on the failure to comply with the contract at the expiration of the time limited, but the damages accrue according to the length of time the breach continues; and again, there is an element of uncertainty as to the real damages which would be sustained by the plaintiff, which renders it more or less impracticable to be determined by a jury. Values of rents are fluctuating, and dwelling-houses of the character and description of this one are ordinarily not built for rent at all, but for the convenience and comfort of the owners," etc.; quoting from various cases: Reichenbach v. Sage, 13 Wash. 364, 43 Pac. Rep. 354, 52 Am. St. Rep. 51.

[20] See, generally, note 56 Am. St. Rep. 312.

Washington. Letter construed as a certificate: Washington Bridge Co. v. Land & R. Imp. Co., 12 Wash. 272, 40 Pac. Rep. 982.

[21] Valley L. Co. v. Struck, 146 Cal. 266, 270, 80 Pac. Rep. 405.

[22] See § 232, ante, and § 252, post.

Failure to obtain certificate: See Wyman v. Hooker, 2 Cal. App. 36, 38, 83 Pac. Rep. 79.

Montana. McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428.

Oklahoma. Payment on estimates of architect: See American Surety Co. v. Scott & Co. (Okl.), 90 Pac. Rep. 7.

Oregon. Approval of work by architect, without being misled or imposed upon, and refusal thereafter to give certificate of final completion: See Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126, 129.

Procuring certificate of completion required by contract is condition precedent to recovery, unless it is waived or the contractor cannot produce it through no fault of his: Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126.

the work the engineer shall make a final estimate of all the work done, and that the balance due, after deducting the previous payments, shall thereupon be paid by the defendant, such estimates are necessary, in order to found an action.[23] And so the certificate of the architect, of expenses incurred by owner upon abandonment of contract, as against sureties, is a condition precedent to recovery.[24]

§ 239. Certificate, when excused. Certificate by architect should not be fraudulently or captiously withheld;[25] and if the architect withholds the certificate without just cause, upon demand, or does so fraudulently or corruptly or by mistake, upon proper pleadings the condition in the contract requiring such certificate before the right to payment arises will not be exacted.[26]

[23] Loup v. California So. R. Co., 63 Cal. 97, 102. See Holmes v. Richet, 56 Cal. 307, 38 Am. Rep. 54; Cox v. McLaughlin, 63 Cal. 207; Ball v. Doud, 26 Oreg. 14, 20, 37 Pac. Rep. 70; Sullivan v. Susong, 30 S. C. 305, 323, 9 S. E. Rep. 156; Scottish U. & N. Ins. Co. v. Clancy, 83 Tex. 113, 115, 18 S. W. Rep. 439. Also Smith v. Briggs, 3 Den. (N. Y.) 73; Herrick v. Belknap, 27 Vt. 673; Morgan v. Birnie, 9 Bing. 672; Elliot v. Royal Ex. Assur. Co., L. R. 2 Ex. 245.

See "Arbitration," § 230, ante.

Washington. But where the work has been completed in substantial compliance with the contract, such certificate cannot rightfully be refused: Washington Bridge Co. v. Land & R. Imp. Co., 12 Wash. 272, 40 Pac. Rep. 982; Craig v. Geddis, 4 Wash. 390, 30 Pac. Rep. 396; but if there remains any material part of the work which could still reasonably be done in accordance with the contract, the architect may rightfully withhold his certificate until the contractor has completed the same; and so long as he can rightfully withhold his certificate, there can be no recovery without it: Craig v. Geddis, supra; Schmidt v. City of North Yakima, 12 Wash. 121, 40 Pac. Rep. 790. See also Gritman v. United States F. & G. Co. (Wash.), 83 Pac. Rep. 6.

[24] Tally v. Parsons, 131 Cal. 516, 63 Pac. Rep. 833.

[25] See § 238, ante, and § 242, post.

Washington. Windham v. Independent T. Co., 35 Wash. 166, 76 Pac. Rep. 936.

Dissatisfaction with work, if done according to the contract, is not ground for withholding the certificate: Olson v. Snake River Val. R. Co., 22 Wash. 139, 60 Pac. Rep. 156.

[26] **Dishonesty of architect:** See Tally v. Parsons, 131 Cal. 516, 63 Pac. Rep. 833.

Certificate withheld by engineer fraudulently, same not required: Donegan v. Houston (Cal. App.), 90 Pac. Rep. 1073.

Hawaii. Fraud of architect excuses procuring certificate of architect as condition precedent: High v. Dunn, 11 Hawn. 37.

Architect cannot be compelled, in a court of equity, to give such certificate, there being a plain, speedy, and adequate remedy at law: High v. Dunn, supra.

§ 240. **Waiver of certificate.** Clauses in contract requiring certificate of architect are generally for the benefit of the owner of the building, for his satisfaction, and not for the benefit of the lien-holder, and may be waived by the former, at his option, or other proof accepted.[27] Likewise as to acceptance of the building by the architect.[28] Waiver of the certificate as evidence of such completion is not an impairment of any claim or lien of any subclaimant under section twelve hundred and one.[29]

§ 241. **Same. Dismissal of architect.** And where such certificates are conditions precedent to payment, and the owner dismisses such architect and employs another, such action renders strict performance impossible; and if the contractor

[27] Valley L. Co. v. Struck, 146 Cal. 266, 270, 80 Pac. Rep. 405; Blethen v. Blake, 44 Cal. 117, 120. See McLaughlin v. Perkins, 102 Cal. 502, 36 Pac. Rep. 839. See Loup v. California So. R. Co., 63 Cal. 97; Newport W. & L. Co. v. Drew, 125 Cal. 585, 58 Pac. Rep. 187.

New Mexico. And so where the owner was "to audit" the amounts certified by the engineer, he cannot avoid payment by refusing to audit the estimates: Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

Utah. Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1009; and if the owners intend to insist upon their rights to a final certificate from the architect, they should notify the contractor; and if the certificate is refused, they can properly refuse payment for that reason: Id.

Washington. Windham v. Independent T. Co., 35 Wash. 166, 76 Pac. Rep. 936; Washington Bridge Co. v. Land & R. Imp. Co., 12 Wash. 272, 40 Pac. Rep. 982.

For the benefit of sureties: De Mattos v. Jordan, 15 Wash. 378, 393, 46 Pac. Rep. 402.

Fact that payments had been made from time to time, without requiring strict performance as to certificates and presentation of vouchers that the labor and materials had been paid for, will not be held to be a waiver; and notwithstanding the fact that the contract provided that the taking possession of the building without notice of any reservation of rights would be a waiver of a right to demand such certificate, the proof must be clear; for "when parties have entered into a solemn agreement in writing, by the terms of which certain things are to be required as a condition precedent to payment, or other act by either party, and such conditions are of such a nature that their performance or non-performance will also be evidenced by writings, public policy demands that neither of the parties shall be held to have waived such conditions without proof of the clearest and most satisfactory kind": Brown v. Winehill, 3 Wash. 524, 28 Pac. Rep. 1037.

[28] Valley L. Co. v. Struck, 146 Cal. 266, 80 Pac. Rep. 405; Castagnino v. Balletta, 82 Cal. 250, 260, 23 Pac. Rep. 127.

[29] **Kerr's Cyc. Code Civ. Proc.,** § 1201. See also Valley L. Co. v. Struck, 146 Cal. 266, 271, 80 Pac. Rep. 405.

obtains the certificate of the architects in charge of the work, it is a sufficient compliance with the contract in that respect.[30]

§ 242. **Conclusiveness of certificate.** But where the contract provides that payments shall be made on the certificate of an architect, who was required by the contract, among other things, to show that all the work of the mechanics, laborers, and others employed by the original contractor had been paid, the court said: "Whatever faithlessness there may have been on the part of the architect in giving his certificates to the contractor, it cannot affect or prejudice the good faith of the owner in making her payments upon the faith of those certificates, for it was the mode of payment which had been agreed upon; and not only is the original contractor bound by his contract, but his material-men and workmen are also presumed to have had notice and knowledge of the terms of it, and of the rights and obligations of the parties thereto.[31] There is nothing in the contract or the mechanic's-lien law which required the architect to give notice of his decision that the contractor was entitled to his certificates. Such a provision, if it existed in the law, might afford some protection to those who have to do with dishonest contractors. But, in the absence of such a provision, the certificate of the architect must be considered conclusive of the rights of the parties under the contract, unless it can be shown that it was obtained by the owner by collusion, or fraud, or mistake."[32] Such a rule, however, of course, has

[30] Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487.

Oregon. So where the owner prevents performance, so that the claimant cannot procure a certificate: Justice v. Elwert, 28 Oreg. 460, 43 Pac. Rep. 649.

Washington. Where the certificate of a firm of architects, which was dissolved, was required, the final certificate of the architect acting in relation to the work was sufficient: Lavanway v. Cannon, 37 Wash. 593, 79 Pac. Rep. 1117.

[31] Dingley v. Greene, 54 Cal. 333, 336, **citing** Shaver v. Murdock, 36 Cal. 293.

[32] Dingley v. Greene, 54 Cal. 333, 336 (this case was decided before the enactment of § 1201, Code Civ. Proc.; q. v.). See Scanlan v. San Francisco & S. J. V. R. Co. (Cal.), 55 Pac. Rep. 694 (engineer's estimate); and compare Moore v. Kerr, 65 Cal. 519, 4 Pac. Rep. 542.

See § 239, ante.

reference only to those matters of which the certificate of the architect is made evidence by the terms of the contract.[33]

But where the certificate of the architect is not acted upon, and no payments are made thereon to the contractor, even if based upon falsely receipted bills provided in the contract to be furnished to the architect before such certificate is given, it seems that such certificate is not conclusive against nor an estoppel upon the contractor's material-men who may have given such false receipts.[34]

§ 243. **Extra work. Generally.**[35] Many bitter contests have arisen over misunderstandings respecting the common clause of a building contract relating to "extra work." Whether such work is done under the original contract, or under an independent contract, is sometimes difficult to determine, depending for its solution upon the peculiar facts of each case.

§ 244. **Same. Definition.** Extra work may be tentatively defined to be such work as is not required to be performed

Idaho. Final certificate and estimate of architect held not conclusive: See Huber v. St. Joseph's Hospital, 11 Idaho 631, 83 Pac. Rep. 768.

Utah. Fraud of engineers in estimates: See Garland v. McMartin, 8 Utah 150, 151, 30 Pac. Rep. 365.

But see "Evidence," § 790, post.

Washington. Conclusiveness of certificate, made so by contract: See De Mattos v. Jordan, 15 Wash. 378, 393, 46 Pac. Rep. 402. See also Schmidt v. City of North Yakima, 12 Wash. 121, 40 Pac. Rep. 790, in which it was held that a city was not estopped from showing the fraudulent acceptance by the engineer of the work and materials, and that the work and materials were inferior.

Certificate of engineer as to completion of work according to contract, which provided that such certificate should be conclusive between the parties, held conclusive in favor of the contractor, although certificate was not in the language of the contract: Eastham v. Western Const. Co., 36 Wash. 7, 77 Pac. Rep. 1051.

[33] See "Evidence," §§ 789 et seq., post.

[34] Washburn v. Kahler, 97 Cal. 58, 60, 31 Pac. Rep. 741.

See also "Fraud," § 239, ante.

[35] See Stimson v. Dunham Co., 146 Cal. 281, 284, 79 Pac. Rep. 968.

Construction of contract as to whether work is extra work, or work under the original contract, is for the court: See Gray v. La Société Française de B. M., 131 Cal. 566, 572, 63 Pac. Rep. 848.

Evidence of extra work: See Sweeney v. Meyer, 124 Cal. 512, 516, 57 Pac. Rep. 479.

See "Evidence," § 797, post.

under the terms of the original contract, and which is not in pursuance of an adequate performance of such contract, but which is performed under an independent contract, express or implied.[36]

§ 245. Same. Extra work provided for in contract. Where the contract fixes a certain price for the work, and also provides that for any extra work a certain price shall be charged, whatever extra work is performed by the contractor is part of the work done under the contract.[37] And

[36] **Colorado.** The question of what constitutes extra work depends, as a general rule, upon the construction of the contract, and the contractor cannot recover for increased cost, as extra work, upon discovering that he has made a mistake in his estimate of the cost, or that the work is more difficult and expensive than he anticipated; but where the contractor is ordered to make changes from the original contract plans, or to do work in some way connected with the original contract, but substantially independent of it, and the circumstances are such that the owner must know that the execution of such orders will cause extra labor and expense to the contractor, not contemplated by the original contract, he is liable to compensate the contractor therefor, as for extra work, in the absence of some express provision in the original contract to the contrary. An extra is somethir beyond or outside of the contract; it is something not provided for, and therefore not covered by the compensation stipulated: Hennessey v. Fleming Bros. (Colo.), 90 Pac. Rep. 77.

[37] Gray v. Wells, 118 Cal. 11, 17, 50 Pac. Rep. 23.

Colorado. Removing rubbish at the request of the owner, not within the terms of the contract, is extra work, and the reasonable value thereof may be recovered; but where more work than is anticipated is required to carry out the contract, no recovery can be had for extra work to perform the contract: Hennessey v. Fleming Bros. (Colo.), 90 Pac. Rep. 77.

As to whether work is under the original contract, or is extra work, see Flick v. Hahn's Peak & E. R. C. & P. M. Co., 16 Colo. App. 485, 66 Pac. Rep. 453, 455.

Hawaii. Work done to complete the contract is not extra work, although ordered in writing, as required for extra work in the contract: American-Hawaiian E. & C. Co. v. Territory, 17 Hawn. 195.

Idaho. Where a contract defined certain classes of material to be excavated, and in the progress of the work an unclassified material (hard-pan) was struck, and the contractor applied for a "hard-pan" classification, and was informed that he should have a fair classification, the contractor was held entitled to recover the reasonable value of removing the hard-pan: Spaulding v. Cœur D'Alene R. & N. Co., 5 Idaho 528, 51 Pac. Rep. 408.

Nevada. Where changes were made in the specifications by the owner, so that the contractor was obliged to supply extra machinery and materials for a mill, they were held to have been supplied under the original contract, and not under a separate contract: Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632, 635 (this case does not seem to be in line with the authorities).

whatever work is done at the request of the owner to complete a contract is a continuation of the previous work, and done under the same contract.[38]

Where the question arose as to whether the work was done by the claimant under a contract of novation in place of the original contract, or whether the work was extra work done under the original contract by the claimant as subcontractor, it was held that the expression "extra work" evidently had reference to the original contract for the conditions and terms under which it was done.[39]

Where, notwithstanding the contract is entire and indivisible, the work is done satisfactorily as agreed, according to the specifications of the contract, and, through the fault of

Oregon. Changing chimneys from common to pressed brick as part of the wall provided in contract: Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437.

Where the contract requires the contractor "to rub down the brickwork on the street sides," the use of acids in so doing does not convert the work into "extra work": Id.

The contractor cannot recover for columns to support balconies of a building, which were required, owing to the malperformance of the contract by the contractor, on any theory that the same are extras: Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126.

Washington. Where one offered to furnish, at a certain price specified, items of lumber for a building, extras to be furnished at the market price, and the offer was accepted, with the proviso that the price named should include all extras, and the seller furnished the lumber without objection, he was not entitled to additional compensation for extras furnished: Littell v. Saulsberry, 40 Wash. 550, 82 Pac. Rep. 909.

As to alterations, see Brown's Exrs. v. Farnandis, 27 Wash. 232, 67 Pac. Rep. 574. See Cowles v. United States F. & G. Co., 32 Wash. 120, 72 Pac. Rep. 1032, 98 Am. St. Rep. 838 (as to alterations not material so as to make a new contract).

Changes by oral agreement, extra work: See Long v. Pierce County, 22 Wash. 330, 61 Pac. Rep. 142, 146 (contract for erection of schoolhouse, requiring contractor to proceed with work on written order of architect, notwithstanding objection to architect's valuation, which was to be submitted to arbitration; held, written order not prerequisite to recovery for extra work not called for in specifications, but required by detail plans subsequently furnished by architect).

[38] McIntyre v. Trautner, 63 Cal. 429, 430. See Conlee v. Clark, 14 Ind. App. 205, 212, 42 N. E. Rep. 762, 56 Am. St. Rep. 303; General F. & E. Co. v. Schwartz Bros. Com. Co., 165 Mo. 171, 181, 65 S. E. Rep. 318; Shaw v. Fjellman, 72 Minn. 457, 468, 75 N. W. Rep. 705; Minneapolis T. Co. v. Great N. R. Co., 74 Minn. 30, 33, 76 N. W. Rep. 593.

Disapproved: Avery v. Butler, 30 Oreg. 287, 293, 47 Pac. Rep. 706.

[39] See Downing v. Graves, 55 Cal. 544, 550.

the owner, a tunnel caved in, the work in repairing the tunnel is extra work.[40]

§ 246. **Same. Contract in writing.** Where the original contract is not required to be in writing, the contract for extra work is not required to be in writing.[41] Where the contract provides, "No extra work to be paid for, unless the price has been fixed by the parties, the work named, and the agreement made at the time the extra work is done," there can be no recovery for extra work, unless the provisions of the contract are complied with.[42] Likewise when the contract provides that the character and valuation of the extra work shall be agreed to and in writing consented to by the owner, although the architect gave verbal instructions to do such extra work.[43]

§ 247. **Same. Verbal alteration of original contract.** In those cases where the statute does not require an alteration of a written contract to be in writing, and the written contract provides that "no extra work is to be paid for except by contract in writing," the parties may verbally rescind this provision and agree to the alterations.[44]

§ 248. **Same. Estoppel.** But where the extra work is done with the knowledge and consent of the owner and his

[40] McConnell v. Corona City W. Co., 149 Cal. 60, 63, 85 Pac. Rep. 929.

[41] Barilari v. Ferrea, 59 Cal. 1, 4 (decided under § 1183 as it stood in 1876. There was no provision for extra work in the original contract).

[42] **Likewise as to a written order,** even where the contract also provides that the engineer may direct additions to the work: White v. San Rafael & S. Q. R. Co., 50 Cal. 417, 420; Meigs v. Bruntsch, 54 Cal. 601, 602.

Montana. Where the contract provided that the order for such extra work should be in writing, it was held that no recovery could be had upon an express oral order for the work, or upon an implied contract without such written order: Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. Rep. 280.

Nevada. See, as to waiver of similar clause, Truckee Lodge v. Wood, 14 Nev. 293, 305.

[43] Gray v. La Société Française de B. M., 131 Cal. 566, 63 Pac. Rep. 848.

[44] McFadden v. O'Donnell, 18 Cal. 160, 165. See Wortman v. Kleinschmidt, 12 Mont. 316, 343, 30 Pac. Rep. 280 (dis. op., De Witt, J.); Truckee Lodge v. Wood, 14 Nev. 307; Crowley v. United States F. & G. Co., 29 Wash. 268, 274, 69 Pac. Rep. 784.

agent, and they waive the written stipulation for a separate written estimate required by the contract, by orally agreeing to a continuance of the work without written estimates, which would not have been done but for such consent of the owner, he will not, on the principle of estoppel, be permitted to repudiate the extra work so done.[45]

In the absence of the principle of estoppel, or of an express agreement to rescind an express clause of the contract requiring a written order or estimate before liability for extra work shall be incurred, no such liability arises.[46]

§ 249. **Same. Arbitration.** A provision is sometimes inserted for the determination of the value of the extra work by arbitration, and such provisions have been upheld as conditions precedent to recovery.[47]

§ 250. **Same. Void contract.** Where the contract is void for non-compliance with the provisions of section eleven hundred and eighty-three of the Code of Civil Procedure, it was held that no lien could be enforced for extra work upon an implied contract, when the lien could not have been enforced for the extra work under the original contract, if valid;[48] but the extent of this doctrine, in the light of the recent decisions relative to the effect of the invalidity of the statutory original contract, has not been established.[49]

§ 251. **Payments. How considered herein.** The subject of payments is closely connected with that of arbitrations,[50]

[45] Wyman v. Hooker, 2 Cal. App. 36, 41, 83 Pac. Rep. 79 (hearing in supreme court denied).

[46] J. M. Griffith Co. v. City of Los Angeles (Cal., Sept. 3, 1898), 54 Pac. Rep. 383; and see Gray v. La Société Française de B. M., 131 Cal. 566, 570, 63 Pac. Rep. 848.

[47] Holmes v. Richet, 56 Cal. 307, 312, 38 Am. Rep. 54. See "Arbitration," §§ 230-235, ante.

Extra work subsequent to mortgage: See "Priorities," §§ 486 et seq.

Oregon. But as to waiving it by pleading to the merits, and not in abatement, see Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437.

Washington. Hughes v. Bravinder, 9 Wash. 595, 38 Pac. Rep. 209. See §§ 230-235, ante.

[48] Morris v. Wilson, 97 Cal. 644, 646, 32 Pac. Rep. 801.

[49] See "Void Contract," §§ 319 et seq., post.

[50] See §§ 230-235, ante.

certificates,[51] extra work,[52] and performance,[53] and what is said elsewhere on those subjects will not be repeated here. The subject of the statutory requirements of California as to the provisions of the contract with reference to payments is considered under the head of "Statutory Requirements."[54]

§ 252. **Same. Conditions precedent.** Conditions precedent in a building contract are like conditions precedent in any other contract, and they must be performed by the contractor before payment can be required under the contract.[55]

§ 253. **Same. Waiver.** Where a contract contemplates the privilege of the owner to pay at his pleasure for materials delivered, in advance of their delivery, conditioned that

[51] See §§ 238-242, ante.

[52] See §§ 243-250, ante.

[53] See "Performance," §§ 334 et seq., post.

Oregon. Where, by the terms of the building contract, the contractor bound himself to "promptly pay, or cause to be paid, for all materials used by him under this contract, and for all labor . . . in the construction and completion" of said building, held, that a failure to promptly pay, or cause to be paid, for any such work or materials constituted a breach of such contract: Thompson v. Coffman, 15 Oreg. 631, 16 Pac. Rep. 713.

Washington. Failure to make payments, breach of contract: Anderson v. McDonald, 31 Wash. 274, 91 Pac. Rep. 1037.

[54] See **Kerr's Cyc. Code Civ. Proc.**, § 1184.

[55] Holmes v. Richet, 56 Cal. 307, 312, 38 Am. St. Rep. 54.

See § 232, ante.

As to conditions precedent, generally, see very full treatment in **Kerr's Cyc. Civ. Code,** § 1439, note pars. 1-45; see also § 256, post.

Contractor's order in favor of his material-man, accepted by a third party, payable upon completion of the building, is not payable, where the building was destroyed by fire before completion, without fault of the material-man or contractor, and nothing becomes due from the owner to the contractor: Hogan v. Globe M. B. & L. Assoc., 140 Cal. 610, 74 Pac. Rep. 153.

Payment made before the commencement of the work, independent promise: See Carpenter v. Ibbetson, 1 Cal. App. 272, 274, 81 Pac. Rep. 1114.

Payments, when due, acceptance of work: See Newport W. & L. Co. v. Drew, 125 Cal. 585, 592, 58 Pac. Rep. 187.

Arizona. See O'Connor v. Adams (Ariz.), 59 Pac. Rep. 105.

Colorado. Orman v. Ryan, 25 Colo. 383, 55 Pac. Rep. 168.

Montana. McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428.

New Mexico. Payment by deed of land: Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

Oregon. Payment to agent: See Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390.

Payment to contractor's material-man at former's request: Allen v. Elwert, 29 Oreg. 428, 440, 44 Pac. Rep. 823, 48 Id. 54.

such materials are satisfactory to the architect, this condition is not waived by such advance payment.[56]

§ 254. Same. Application of payments. The general principles of application of payment are set forth in the Civil Code of California,[57] and they will not be considered here in detail. When, at the time that the owner pays an amount to the contractor, the former manifests an intention to apply it upon a particular obligation, and the latter knows of such intention, it is sufficient to fix the application of the payment, and the mode by which the debtor manifests his intention is immaterial.[58] Pending the delivery of bricks, and within a few days thereafter, the original contractor paid money to his material-man without specially directing the application of the payment, and the plaintiff applied a portion of the money to the payment of a debt due him from the contractor previous to the time of the contract, and it was held that he

[56] Bateman Bros. v. Mapel, 145 Cal. 241, 243, 78 Pac. Rep. 734. See § 240, ante.

Oregon. Waiver of final certificate of architect as a condition to suit for final payment: See Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126. See also Hand Mfg. Co. v. Marks, 36 Oreg. 523, 59 Pac. Rep. 549, 552.

[57] **Kerr's Cyc. Civ. Code,** § 1479, and note.

[58] Hanson v. Cordano, 96 Cal. 441, 31 Pac. Rep. 457 (valid statutory original contract. In this case the original contractor attempted to apply the payment to a former debt owing to him by the owner).

Oregon. A debtor, when he pays a sum of money to his creditor, may direct to which of different debts due from him to his creditor it shall be applied. If he does not so direct, the creditor may make the application of the payment, and if neither of the parties make the application, then the court may make it, and will generally apply it on a debt that is unsecured, in preference to one that is secured: Trullinger v. Kofoed, 7 Oreg. 228, 33 Am. Rep. 708.

Utah. Application of payments: See Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781.

Washington. Where a joint mechanic's lien against several houses was released as to one of the houses, in consideration of payments already made, such payments should be applied, first to the amount due on account of the house released, and then pro rata to the others: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720.

Application of payments: See Burnett v. Ewing, 39 Wash. 45, sub nom. Burnett v. Kirk, 80 Pac. Rep. 855; Spaulding v. Burke, 33 Wash. 679, 74 Pac. Rep. 829.

Creditor has right to apply payments when the debtor does not make application: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 718.

Application of payments, mortgage, extras: See likewise Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719.

had no right to do so, the court saying, "If this could be done, it would have the effect of subjecting the owner to the payment of other debts between the contractor and his employees outside of his building contract." [59]

Where subclaimants apply payments made to them by the contractor, to another building contract, and other unconnected claims against the contractor, the owner of the building cannot apply such payments to reduce the demand of the subclaimants, even if the contractor uses the receipt from the subclaimants in obtaining a credit on the building contract, and in inducing the owner to make further advances, if the subclaimants repudiate such application by the owner, and the subclaimants settle with the contractor, without his claiming the benefit thereof, and the procuring of additional money from the owner, by such receipt of the contractor, was without the knowledge or consent of the subclaimants; but the rule may be otherwise if the owner is misled, or would otherwise pay the contractor or other creditor more money than the amount of his indebtedness to the contractor.[60]

§ 255. **Liens. Statutory provision. California.** Section twelve hundred and one of the Code of Civil Procedure provides: "It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void." [61]

[59] Goss v. Strelitz, 54 Cal. 640, 645.

Montana. See Christnot v. Montana G. & S. M. Co., 1 Mont. 44 (owner's laborer may appropriate, if owner does not do so).

[60] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 365, 27 Pac. Rep. 743.

Oregon. Where the owner, relying upon a waiver of subclaimants, pays the balance due to the contractors, the lien is lost: Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 75 Am. St. Rep. 574.

Equal application of payment on two houses: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708.

[61] Whittier v. Wilbur, 48 Cal. 175, 177 (1867-68). In Bowen v. Aubrey, 22 Cal. 566, 571 (1858), the contract provided that the contractor should not sublet without the written permission of the owner, and should not encumber, nor suffer to be encumbered, the building or lot by any liens, and it was held that the contractor having waived his right to a lien, his subcontractor, having notice of the contract, and having performed the said contract without the written consent, was held bound by the terms of the original con-

§ 256. Same. Condition precedent. Where the contract provides "that for each of said payments a certificate shall be obtained from and be signed by the architect, and also, that at the time of the presentation of either of said certificates there be neither opposition against the said payments, nor any liens against the aforesaid building," the existence of such a lien constitutes a good and sufficient reason for non-payment.[62]

tract, and to have waived his lien; but there was no provision in the statute like § 1201, **Kerr's Code Civ. Proc.**

Washington. See Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 125, 34 Pac. Rep. 774.

[62] Holmes v. Richet, 56 Cal. 307, 316, 38 Am. St. Rep. 54.

As to condition precedent, see § 252, ante.

Agreement of contractor not to file lien: See Knowles v. Baldwin, 125 Cal. 224, 226, 57 Pac. Rep. 988.

See note 1 Am. & Eng. Ann. Cas. 954.

Colorado. Where a contractor is not to allow any sublliens to be set up, or, otherwise, to cause them to be satisfied, and there is no provision in the contract prohibiting the contractors themselves from filing a claim of lien, subclaimants may nevertheless claim a lien, the contract merely providing for the satisfaction thereof by the contractor, if asserted: Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846. And the contractors themselves might file a lien: Id.

Hawaii. An agreement by the contractor to give sufficient evidence that the premises are free from liens, and to indemnify the owner for payments made in discharging liens, does not estop the material-men and contractor's subcontractor from enforcing a lien: Allen v. Redward, 10 Hawn. 151, 157; but it might estop the original contractor from filing a lien (dictum): Id.

Montana. Payment cannot be demanded except only upon satisfactory proof that there was no claim or lien against the building, when the contract so provided: Franklin v. Schultz, 23 Mont. 165, 57 Pac. Rep. 1037.

Nevada. Lien not waived by stipulating in the original contract that the title to machinery should not pass to the purchaser until all payments should be made in cash : Salt Lake H. Co. v. Chainman M. & E. Co., 128 Fed. Rep. 509, s. c. 137 Fed. Rep. 632. See Hooven v. Featherstone, 111 Fed. Rep. 81, 95 C. C. A. 229, and authorities cited.

New Mexico. But where the contract provides for such certificate of an engineer, and a showing that no claims of lien have been filed, and the contractor complies therewith, and subsequently files his claim by reason of failure of the owner to pay, the fact that claims of lien are subsequently filed by subclaimants will not affect his lien : Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541, s. c. affirmed, 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170.

Oregon. Where the building is to be kept free from liens for a certain period beyond the time for making the last payment, the contractor is not entitled to such payment, if such liens were then upon the building : Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.

Where the contract provided that the owner should be satisfied, before making the final payment, that no liens had been placed on the property, this is no defense to the contractor's claim, where the owner incurred the indebtedness for which a material-man filed a lien : Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126, 131.

§ 257. Same. Public property. And where the contract is to erect a monument upon public property, a clause in the contract, that "before any payment is made under the contract the contractor shall satisfy the said architects" that all materials furnished, and all the work of mechanics, laborers, and others employed or hired by the contractor, "have been fully paid, so that no lien can be filed against said work," etc., is unnecessary, since no lien can be had upon public property.[63]

Washington. The contractor may recover the balance of the contract price, when the contract provides that when it has been fully performed, and upon a showing made that there are outstanding no claims by reason of work performed or materials furnished that could be made the basis of a lien, the owner would pay the contractor the balance due and unpaid, if the contractor exhibits to the owner receipts and vouchers for all labor performed and materials furnished, showing them to be fully paid for: Lavanway v. Cannon, 37 Wash. 593, 79 Pac. Rep. 1117.

[63] Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487. See "Public Property," § 192, ante.

CHAPTER XIV.

BUILDING CONTRACTS (CONTINUED). NON-STATUTORY ORIGINAL CONTRACTS.

§ 258. Method of treatment.
§ 259. Statutory and non-statutory original contracts compared.
§ 260. Same. Implied contract.
§ 261. Same. Contract price less than one thousand dollars.
§ 262. Same. Contract price computable.
§ 263. What in no event a statutory original contract.
§ 264. Provisions not applicable to non-statutory original contracts.
§ 265. Same. Writing. Filing. Payments.
§ 266. Same. Notice to owner. Premature payments.
§ 267. Same. Payment in land.
§ 268. Same. Alteration of contract. Conspiracy.

§ 258. **Method of treatment.** In this chapter will be considered:

1. Non-statutory original contracts in general; that is, contracts not required by the mechanic's-lien law to be in the form prescribed by the statute,[1] and their differentiation from statutory original contracts.

In the following chapter [2] will be considered:

2. Statutory original contracts; and herein:

A. Statutory requirements not essential to the validity of the whole statutory original contract; and hereunder:

a. Provisions imposing a penalty; and

b. Provisions avoiding certain clauses.

And in the second chapter following [3] will be considered:

B. Statutory requirements essential to the validity of the whole statutory original contract.

In the succeeding or third chapter following [4] this chapter will be discussed:

3. The effect of the validity and invalidity of the statutory original contract.

[1] **Kerr's Cyc. Code Civ. Proc., § 1183.**
[2] Chapter xv.
[3] Chapter xvi.
[4] Chapter xvii.

§ 259. **Statutory and non-statutory original contracts compared.** The definitions of statutory and non-statutory original contracts have already been given.[5] A "non-statutory" original contract, under the California statute, can be distinguished from a "statutory" original contract by a careful examination of the terms of section eleven hundred and eighty-three of the Code of Civil Procedure,[6] and will be specifically pointed out and illustrated in this and succeeding chapters. In the statutory original contracts the amount agreed to be paid must exceed one thousand dollars.[7]

§ 260. **Same. Implied contract.** It is evident from what has been said, that where the contract price is not expressly agreed to be paid, but is left to implication of law, it is not a "statutory original contract," but is a "non-statutory original contract";[8] and in such case the implied contract for labor or materials is not complete until after the labor is done, or the materials are furnished, at the request of the owner of the contemplated structure.[9]

§ 261. **Same. Contract price less than one thousand dollars.** In those cases where the original contract price,

[5] See § 214, ante.

[6] **Non-statutory and statutory original contracts.** Care must be taken, in considering decisions with reference to this point, to note that the section was first amended in 1885 so as to create this distinction, and that cases of contracts previous to that time, where the agreed value was over one thousand dollars, stand upon the same footing as "non-statutory original contracts" (except, in a slight degree, in the case of any decision rendered under § 2 of the act of April 26, 1862).

Colorado. Laws 1899, pp. 261, 262, § 1 (3 Mills's Ann. Stats., 2d ed., § 2267), provides for a similar statutory original contract, when the amount to be paid exceeds five hundred dollars; but the statute simply makes the property of the owner subject to the lien for the value of the labor performed and materials furnished, and does not make the original contract void.

[7] **The general rights and duties under statutory original contracts** will be further considered under the head of "Valid Statutory Original Contracts," §§ 315 et seq., post.

[8] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 393, 30 Pac. Rep. 564.

Colorado. See Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64 (1893). See preceding note.

[9] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 393, 30 Pac. Rep. 564.

Colorado. See Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64 (1893).

although express, does not exceed one thousand dollars, it is not a "statutory original contract," but is a "non-statutory original contract." [10]

In this connection the court has said: "It was not intended, we think, that, in order to preserve the right of lien, a laborer [sic] or contractor should be put to the trouble of entering into a written contract, and reserving twenty-five per cent of the contract price for thirty-five days after the completion of the work, in cases where the contract price is less than one thousand dollars. The rule contended for would be a harsh one in cases where the contract price was less than one thousand dollars, — small amounts." [11]

§ 262. **Same. Contract price computable.** When the contract necessarily shows that the agreed price is more than one thousand dollars, as by fixing a rate per yard, and the number of yards would bring the price to more than one thousand dollars, it is a statutory original contract, and must comply with the provisions of section eleven hundred and eighty-three; [12] but otherwise if it does not expressly appear from the contract that the agreed price is more than one thousand dollars.[13]

Evading statute. The requirements of the statute as to statutory original contracts cannot be evaded by failing to express the contract price in the contract, when, as a matter of fact, a price in excess of one thousand dollars is actually and necessarily agreed upon.[14]

[10] Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932; Kerckhoff-Cuzner M. & L. Co. v. Cummings, 86 Cal. 22, 25, 24 Pac. Rep. 814; Denison v. Burrell, 119 Cal. 180, 51 Pac. Rep. 1; Southern California L. Co. v. Jones, 133 Cal. 242, 245, 65 Pac. Rep. 378.

[11] Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932.

[12] Smith v. Bradbury, 148 Cal. 41, 82 Pac. Rep. 367, 113 Am. St. Rep. 189. This case, however, failed to notice the opinion on the same contract in Snell v. Bradbury, 139 Cal. 379, 383, 73 Pac. Rep. 150, in which case the question arose as to effect of the failure to state the contract price expressly in the contract, and it was held that the contract need not express a price when no expressed price was agreed upon. It is believed that the doctrines contained in the text are all that can be safely said to have been decided in these cases as they stand.

[13] Snell v. Bradbury, 139 Cal. 379, 383, 73 Pac. Rep. 150; but see same contract in Smith v. Bradbury, 148 Cal. 41, 82 Pac. Rep. 367, 113 Am. St. Rep. 189.

[14] Smith v. Bradbury, 148 Cal. 41, 82 Pac. Rep. 367, 113 Am. St. Rep. 189.

See "Original Contract," § 211, ante.

§ 263. What in no event a statutory original contract. Where the contract is not an original contract at all, as, for instance, in the case of the contract of a mere material-man, the provisions of sections eleven hundred and eighty-three and eleven hundred and eighty-four of the Code of Civil Procedure as to the formalities of the contract have no application whatever, whether the agreed price is more or less than one thousand dollars.[15] And, likewise, a contract for street-work, under section eleven hundred and ninety-one, is not a statutory original contract.[16]

§ 264. Provisions not applicable to non-statutory original contracts. It may be stated generally that the statutory provisions specially applicable to statutory original contracts are not required in the case of non-statutory original contracts.[17] And unless the language used in the statute, "his contract," "the contract," etc., is construed to allude only to the statutory original contracts prescribed by the statute,[18] it may be somewhat difficult to determine when such provisions are or are not applicable to a contract under investigation.

§ 265. Same. Writing. Filing. Payments. The supreme court has held that, under the California statute, non-statutory original contracts need not be in writing;[19] nor filed, if written;[20] neither, under these decisions, need twenty-five per cent of the whole contract price be payable at least thirty-five days after the final completion of the

[15] **Extremely misleading are some expressions of the court** in the decisions in Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 378, 51 Pac. Rep. 555, and Madera F. & T. Co. v. Kendall, 120 Cal. 182, 184, 52 Pac. Rep. 304, 65 Am. St. Rep. 117, although the judgments are undoubtedly correct.

[16] See § 215, ante.

[17] Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932. And see Kerckhoff-Cuzner M. & L. Co. v. Cummings, 86 Cal. 22, 25, 24 Pac. Rep. 814.

[18] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[19] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

[20] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378; Nason v. John, 1 Cal. App. 538, 541, 82 Pac. Rep. 566. See note 25, post, this chapter.

work;[21] nor need the contract price be payable in instalments, nor after the commencement of the work.[22] But the contract price may, in such case, be made payable before the work is commenced, or may be made payable after the building is completed, or at such other time or times as the owner and contractor may have agreed.[23]

§ 266. **Same. Notice to owner. Premature payments.** In those cases in which the contract price is not required by the statute to be paid according to the provisions of section eleven hundred and eighty-four of the Code of Civil Procedure, it may be paid in accordance with the terms of the contract. Thus in an early case, there being a non-statutory original contract, it was held that where the statute gives a lien "to the extent of the original contract price" to the original contractor, a lien was given only for an amount not exceeding the sum to become due to such contractor for the benefit primarily of subclaimants, and where the subcontractor has been fully, and not prematurely, paid by the original contractor, in accordance with their contract, the former's subclaimants can demand nothing from the original contractor or owner, nor by notice intercept any amount due from the owner to the contractor; and their right to enforce a lien is limited to the sum due from contractor to the subcontractor at the time.[24]

[21] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378; Sidlinger v. Kerkow, 83 Cal. 42, 45, 22 Pac. Rep. 932 (under one thousand dollars); Kerckhoff-Cuzner M. & L. Co. v. Cummings, supra (under one thousand dollars); Denison v. Burrell, 119 Cal. 180, 182, 51 Pac. Rep. 1 (under one thousand dollars).

Colorado. Contract was not required, under ch. lxv, Gen. Stats., to be under seal or in writing: Williams v. Uncompahgre Canal Co., 13 Colo. 469, 479, 22 Pac. Rep. 806.

[22] Kerckhoff-Cuzner M. & L. Co. v. Cummings, 86 Cal. 22, 25, 24 Pac. Rep. 814; Denison v. Burrell, supra. See Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 592, 25 Pac. Rep. 747.

[23] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378; Denison v. Burrell, 119 Cal. 180, 182, 51 Pac. Rep. 1; Nason v. John, 1 Cal. App. 538, 541, 82 Pac. Rep. 566.

[24] Dore v. Sellers, 27 Cal. 588, 594 (1862). See Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

See also "Rights of Subcontractor," §§ 70-73, ante; "Lien as Limited by Contract," § 315, post; "Liability of Owner," §§ 526 et seq., post.

This doctrine has been broadened recently, even in the case of original contracts, and it is now held that where there is a non-statutory original contract, the payment of the contract instalments, if any, is subject to change by agreement of the owner and contractor, both as to time and amount, as in the case of private contracts relating to other matters, and section twelve hundred and one, as to the impairment of liens, has no application;[25] and if the owner, under such a contract, makes a premature payment to the contractor before notice is served upon him by a subclaimant, he is not liable.[26]

§ 267. **Same. Payment in land.** A non-statutory original contract may be made payable in money, or in anything else the parties thereto may agree upon; but a subclaimant under such a non-statutory original contract may foreclose a lien, notwithstanding the contract price is less than one thousand dollars, and is payable in something other than money, for instance, land, if it has not been in fact paid when the claim of lien was filed and the action commenced.[27]

§ 268. **Same. Alteration of contract. Conspiracy.** The terms of a non-statutory original contract, if in writing, may be altered by a contract in writing or by an executed oral agreement, and not otherwise.[28] And it seems that the provisions as to conspiracy in reference to the contract price have no application to non-statutory original contracts.[29]

[25] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378. But see certain expressions in the opinion in Nason v. John, 1 Cal. App. 538, 540, 82 Pac. Rep. 566, in which the court fails to note the great distinction, in this respect, between statutory and non-statutory original contracts.

[26] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378. See Los Angeles Pressed Brick Co. v. Los Angeles P. B. & D. Co. (Cal. App., Jan. 23, 1908), 94 Pac. Rep. 775.

[27] Under **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1184, and **Kerr's Cyc. Civ. Code,** § 1201; Schmid v. Busch, 97 Cal. 184, 188, 31 Pac. Rep. 893. See, however, "Payment," § 280, post, it now being held that the statutory original contract may provide for payment other than in money.

[28] Anderson v. Johnston, 120 Cal. 657, 659, 53 Pac. Rep. 264; **Kerr's Cyc. Civ. Code,** § 1698, and note.

See "Alteration of Contracts," § 326, post.

[29] See Sidlinger v. Kerkow, 82 Cal. 42, 46, 22 Pac. Rep. 932.

CHAPTER XV.

BUILDING CONTRACTS (CONTINUED). STATUTORY ORIGINAL CONTRACTS.

A. Statutory Requirements not Essential to the Validity of the Whole Statutory Original Contract.

§ 269. Provisions imposing a penalty. Payments, in general. Statutory provision.
§ 270. Same. Scope and object of these provisions.
§ 271. Same. Substantial compliance required. Effect.
§ 272. Same. Contract price not to be payable in advance of the work.
§ 273. Same. Contract price payable in instalments, or after completion.
§ 274. Same. Payment of twenty-five per cent thirty-five days after completion.
§ 275. Same. The object of this provision.
§ 276. Same. General rule.
§ 277. Same. Illustrations. Sufficient compliance.
§ 278. Same. What not substantial compliance.
§ 279. Same. Provision as to liens.
§ 280. Same. Payment in money.
§ 281. Same. Contractor's bond. Provision unconstitutional.
§ 282. Same. Effect of giving bond. Common-law obligation.
§ 283. Same. Previous decisions concerning bond.
§ 284. Provisions avoiding certain clauses. Impairment of liens. Statutory provision.
§ 285. Same. Provision, when not applicable.

A. STATUTORY REQUIREMENTS NOT ESSENTIAL TO THE VALIDITY OF THE WHOLE STATUTORY ORIGINAL CONTRACT.

§ 269. Provisions imposing a penalty. Payments, in general. Statutory provision. The California mechanic's-lien law [1] provides: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in instalments at specified times after the commencement of the work, or on

[1] Kerr's Cyc. Code Civ. Proc., § 1184.

the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. . . . As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner and against the contractor; no alteration of any such contract shall affect any lien acquired under the provisions of this chapter. In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." [2]

§ 270. **Same. Scope and object of these provisions.** The expression "any such contract," in this provision, refers to the statutory original contract of section eleven hundred and eighty-three.[3]

The object of these provisions seems to be to give ample opportunity to claimants to intercept moneys in the hands of the owner, by notice to him or by filing their claim of lien,[4] and are for the benefit of lien claimants.[5]

§ 271. **Same. Substantial compliance required. Effect.** Only substantial compliance with the provisions of section eleven hundred and eighty-four is required.[6] This section does not declare the contract to be void in case it does not

[2] **Amendment of 1885** to this section made the whole contract void by a failure to comply substantially with its provisions; but the amendment of 1887 changed the penalty, as above shown: See San Diego L. Co. v. Wooldredge, 90 Cal. 574, 577, 27 Pac. Rep. 431; Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. Rep. 512.

Colorado. Similar provision: Laws 1899, pp. 263-265, § 2, 3 Mills's Ann. Stats. Supp., § 2568.

[3] Sidlinger v. Kerkow, 82 Cal. 42, 44, 22 Pac. Rep. 932.

[4] See "Obligations of Owner as Fixed by Notice," §§ 547 et seq., post.

[5] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

[6] Brill v. De Turk, 130 Cal. 241, 243, 62 Pac. Rep. 462.

conform substantially to its provisions.[7] It requires good faith on the part of the owner, however;[8] and only imposes a penalty upon the owner by making his property subject to liens for labor done and materials furnished,[9] and the court indulges every reasonable intendment to avoid these penalties.[10]

In case of material non-conformity with these provisions of section eleven hundred and eighty-four, sublienors may enforce their liens, irrespective of the amount due under the contract.[11] The provision in the section that, under such circumstances, the work and materials are deemed to have been done at the personal instance and request of the person who contracted with the contractor does not mean that such person is personally liable, but that a lien may be enforced against the property for the value of the work or materials.[12]

§ 272. Same. Contract price not to be payable in advance of the work. Under the mechanic's-lien law,[13] no part of the contract price should be payable in advance of the commencement of the work, under the terms of a statutory original contract.

Under section five of the act of 1862,[14] which did not require the contract price to be payable in any particular man-

[7] Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072; San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431. See Yancy v. Morton, 94 Cal. 558, 561, 29 Pac. Rep. 1111.

[8] Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072, 1074; Joost v. Sullivan, 111 Cal. 286, 296, 43 Pac. Rep. 896.

[9] Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072.

[10] Brill v. De Turk, 130 Cal. 241, 243, 62 Pac. Rep. 462; Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072; San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431. See Yancy v. Morton, 94 Cal. 558, 561, 29 Pac. Rep. 1111; West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533.

See § 26, ante.

[11] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431.

[12] See "Liability of Owner," § 539, post. **Kerr's Cyc. Code Civ. Proc.,** § 1184, seems simply to nullify any payment, under a statutory original contract, which is prematurely made, and does not affect any other payment which is valid.

Colorado. See Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 787.

[13] **Kerr's Cyc. Code Civ. Proc.,** § 1184. See Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

[14] **Act of April 26, 1862,** Stats. 1862, p. 385, repealing prior acts; itself repealed, Stats. 1867-68, p. 594. Principal features of statute of April 26, 1862, is embodied in § 1184, Code Civ. Proc.

ner under the terms of the contract, it was held that if the contractor engages to construct a building in consideration, in whole or in part, of a debt then due from him to the employer, or of a sum paid him by the employer upon the execution of the contract, that portion of the contract price represented by the debt or the advance payment cannot become a lien upon the building.[15]

§ 273. **Same. Contract price payable in instalments, or after completion.** In a statutory original contract the contract price must be payable in instalments at specified times after the commencement of the work, or on the completion of specified portions thereof, or on the completion of the whole work.[16] It seems that the statute does not fix the time of any payment, except the final instalment, and it does not make the time there fixed the test of liability, as the contract must furnish the test.[17]

Payments provided for, to material-men. Where the contract provides for payments to be made, through the owner, to the material-men when the materials were used on the building, and to the mechanics and laborers weekly for work actually done, it is specific enough as to time, and complies substantially with the statute;[18] and where a statutory original contract provides for progress instalments, in analogy to the rule as to the completion of the building for the purpose of filing claims of lien, "a trivial imperfection" in the work will not cause an instalment to be prematurely paid, where the claimant is not injured, so as to create a further liability against the owner's property to the extent of such instalment.[19]

When third payment to contractor was to be made when the building and improvements should be "completed and ac-

[15] Dore v. Sellers, 27 Cal. 588, 593.

[16] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

See §§ 269 et seq., ante.

[17] Valley L. Co. v. Struck, 146 Cal. 266, 272, 80 Pac. Rep. 405, concurring opinion of Shaw, J.; and see this case generally on the whole subject.

[18] Reed v. Norton, 90 Cal. 590, 601, 34 Pac. Rep. 333. See Brill v. De Turk, 130 Cal. 241, 242, 62 Pac. Rep. 462.

[19] Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072, 1074.

See "Premature Payments," §§ 269 et seq., ante; and "Obligations of Owner," §§ 522, 541, 554 et seq., and §§ 563, 600, post.

cepted by the architect," the fact that the owner made such payment after the completion of the building, and before the acceptance by the architect, does not render the payment invalid as to lien-holders, under section eleven hundred and eighty-four, where such lien-holders had not given previous notice of their claims, as provided in that section.[20]

Provision for payment of bills. Sufficiency. Where a statutory original contract recites that " all bills for material and labor, when indorsed by the contractor, will be paid on demand, provided that said bills for material and labor do not exceed seventy-five per cent of the value of the material and labor employed in the erection of said building up to the date of said bills," it is a substantial compliance with the statute as to the times and amounts.[21]

Provision for withholding percentage of contract price. And a statutory original contract requiring " twenty-five per cent of the contract sum to remain unpaid until thirty-five days from and after the completion " of the building, and its acceptance by the architect and " the remaining amount to be paid in partial payments in amount equal to seventy-five per cent of the value of the work done and materials furnished at the time of such payments," complies substantially with the section.[22]

§ 274. **Same. Payment of twenty-five per cent thirty-five days after completion.**[23] Under a California statutory original contract, at least twenty-five per cent of the whole contract price must be made payable at least thirty-five days

[20] Valley L. Co. v. Struck, 146 Cal. 266, 270, 80 Pac. Rep. 405.

[21] The court say: " The contract goes even further than the statute, because, by its terms, there must be at all stages of the work at least twenty-five per cent of the value of the work and labor furnished unpaid to the contractor and still in the hands of the owner of the building. The safeguard intended by the statute is accomplished in the contract, and this is all that is necessary, because the penalty for the disregard of the statute attaches only when the contract does 'not conform substantially to the provisions of this section' ": Brill v. De Turk, 130 Cal. 241, 243, 62 Pac. Rep. 462.

[22] Dunlop v. Kennedy (Cal.), 34 Pac. Rep. 92 (rehearing granted. On the subsequent hearing this point was eliminated).

See § 274, post.

[23] **As to offsets against stipulated payments,** see Hampton v. Christensen, 148 Cal. 729, 84 Pac. Rep. 200.

after the final completion of the contract,[24] and if it omits so to provide, it is void as to all persons furnishing material or performing labor upon the building, whether before or after the filing of the contract.[25]

§ 275. **Same. Object of provision.** The object of this provision is for the protection of subcontractors, material-men, and laborers, thus giving them, if unpaid, ample time, after the work is completed, to file their claims of lien and secure payment of any sums of money due them.[26]

Owner pays at his own risk claims of liens asserted against the final twenty-five per cent of the contract price, when he does so without an order of court or any judgment as to their validity.[27]

Partial payments may be safely made by the owner, it seems, provided subclaimants do not give notice, as required by section eleven hundred and eighty-four; and in the absence of such notice they must rely upon the personal responsibility of the contractor, and the twenty-five per cent of the whole contract price required to be retained for thirty-five days after the completion of the work; and in such case they are in no wise affected by any uncertainty as to the time when partial payments are to be made, nor by payments thereof in advance of the time specified.[28]

§ 276. **Same. General rule.** Where the provisions of the contract as to the time of final payment are substantially in conformity with the provisions of the section of the mechanic's-lien law, and no lien-holder is injured by a variation

[24] **Kerr's Cyc. Code Civ. Proc.,** § 1184. See Hogan v. Globe Mut. B. & L. Assoc., 140 Cal. 610, 613, 74 Pac. Rep. 153; Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

[25] Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262. A contract which makes the whole price due and payable at and before the completion of the building is a substantial departure from the provision of § 1183 of the Code of Civil Procedure, making one fourth payable thirty-five days after the completion of the contract: Merced L. Co. v. Bruschi (Cal. Sup., Nov. 29, 1907), 92 Pac. Rep. 844.

[26] De Camp L. Co. v. Tolhurst, 99 Cal. 631, 635, 34 Pac. Rep. 438. See Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

[27] Wilson v. Nugent, 125 Cal. 280, 57 Pac. Rep. 1008.

[28] Dunlop v. Kennedy (Cal.), 34 Pac. Rep. 92 (rehearing granted. On the subsequent hearing this point was eliminated).

from the exact provisions of the statute, it seems that it is sufficient.[29]

§ 277. **Same. Illustrations. Sufficient compliance.** Thus where there is a provision in the contract that the balance of twenty-five per cent of the contract price shall be paid after the completion of the building, but may be paid at any time between the date of completion and the expiration of the thirty-five days in case the contractors show receipts and give special bonds that all bills will be paid and that no liens or other claims exist against the premises, such payment to be optional with the owner, it is sufficient.[30]

Last payment thirty-six days after completion. And so where the contract provides that the last payment shall be made "within thirty-six days" after the completion of the contract, the owner does not incur the penalty of the statute; for when a debtor is allowed a certain period within which to make payment, the debt is not due until the expiration of the period, the court saying, "I think a debt cannot be said to be due until the creditor can rightfully demand and insist upon payment. This is the usual and conventional meaning of the language as applied to deferred payments. Unless the money is put out upon interest, and the creditor is making a profit by having it kept out, it will be presumed that he will accept payment whenever it is tendered. The extended credit in such a case is wholly for the benefit of the payor. The contractor, laborers, and material-men in a building contract are presumed to be willing to receive their pay at the earliest possible moment, and, aside from the statute, it would be lawful and proper that the owner should pay at once. Regarding the contract without reference to the statute, therefore, one would say the postponement of payments is solely for the benefit of the owner. Although the code requires this particular contract to be made that lienors may be protected, still it must be construed as the voluntary undertaking of

[29] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431; Yancy v. Morton, 94 Cal. 558, 561, 29 Pac. Rep. 1111; Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072.

[30] Yancy v. Morton, 94 Cal. 558, 561, 29 Pac. Rep. 1111. "The proviso found in this contract was undoubtedly for the benefit of the contractor."

the parties, and interpreted in the same way. . . . The words of the statute must be understood in their popular sense, and, so understood, the contract does not violate the statute." [31]

Substitution of thirty days after the completion of the building, instead of thirty-five days required by the mechanic's-lien law, also has been held sufficient, since claims of lien must be filed within thirty days, and attach before the payment could be legally made under the contract.[32]

Less than twenty-five per cent reserved. Likewise where a smaller amount than that required by the statute, namely, fifteen dollars, less than the twenty-five per cent of the contract price, is, under the contract, to be paid thirty-five days after the completion of the work, it is a substantial compliance, especially when more than twenty-five per cent was in fact retained, upon the principle, De minimis non curat lex, the deficiency being trifling in comparison with the whole amount of such payment, and no claimant being injured.[33]

§ 278. **Same. What not substantial compliance.** On the other hand, it is not a substantial compliance with the statute where the statutory original contract provides merely, " The last and final payment is to be made thirty-five days after completion of the work according to contract," without specifying the amount of that payment, although it is previously provided in the contract that " seventy-five per cent of the cost of material and work completed at the time of payment is to be paid on the first and third Saturdays of each month as the work progresses." The court said: " There is a manifest differenee between setting forth the amount that is to be paid at any particular date, and stating that a certain percentage of the cost will be so paid. Although the cost and the eontraet priee of the work contracted for may be the

[31] Apparently the case of a statutory original contract : West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533, 534, **citing** Reed v. Norton, 90 Cal. 590, 26 Pac. Rep. 767, 27 Id. 426, and Yancy v. Morton, 94 Cal. 558, 561, 29 Pac. Rep. 1111.

[32] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 579, 27 Pac. Rep. 431. See Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072, 1074.

[33] Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072, 1074. In this case it was intended to have twenty-five per cent reserved for thirty-five days, and the other provision was inserted by a mistake of figures.

same, yet there is no necessary connection between the two. It is easy to see that a contract might be entered into at such a figure for the entire work that a payment of seventy-five per cent of the cost of the material and work completed at stated times as the work progressed would exhaust the entire contract price at or before the completion of the building, so that there would be nothing with which to meet the liens that might be filed within thirty days thereafter." [34]

A provision in a statutory original contract, that the final payment shall be made upon the production of receipts in full to the owner, is not a substantial compliance with the statute as to the time for making the final payment, nor even an attempt in that direction.[35]

§ 279. **Same. Provision as to liens.** In a case where the contract provided that the final payment should be paid "thirty-five days after completion and date of acceptance, provided said building and premises were free and clear from any and all liens and encumbrances arising from or created or placed thereon by the said contractor, or any person claiming to have furnished him labor or materials for the erection and completion of said work," and before the thirty-five days expired the contractor filed a claim of lien, it was held that the clause quoted was not equivalent to an express agreement that no lien should be filed by the contractor until after the expiration of the thirty-five days, the complaint being filed after the thirty-five days.[36]

[34] Willamette S. M. L. & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 235, 29 Pac. Rep. 629. The court viewed the word "cost" from the standpoint of the contractor, and not from that of the owner. The contract price was the cost to the owner. From this point, and to avoid the penalty (see §§ 266, 269 et seq., ante), perhaps, the ruling would have been otherwise.

Oregon. The fact that a payment has been made before thirty days from the expiration of the completion of the building will not have the effect to discharge any part of the lien, unless such payment was made to the person furnishing material or performing work: Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996.

[35] Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262, **quoting** from Hampton v. Christensen, 148 Cal. 729, 735, 84 Pac. Rep. 200.

[36] **Knowles v. Baldwin,** 125 Cal. 224, 226, 57 Pac. Rep. 988. The court say: "The code (Code Civ. Proc., § 1184) provides that by the terms of the contract at least twenty-five per cent of the contract price shall

§ 280. **Same. Payment in money.** The requirement as to payment of the statutory original contract price in money, under section eleven hundred and eighty-four, was held to have no application to non-statutory original contracts,[37] or to contracts which were not original contracts, such as subcontracts, and contracts between the owner and his laborer.[38] It has already been shown [39] that this clause of the section has been declared an unconstitutional invasion of the right of the owner in the possession of his property, and to contract respecting the use to which it may be subjected and the manner in which it may be enjoyed;[40] and so a statutory original contract which provides for payment partly in materials and partly in money is not only valid, but if the statute is otherwise complied with, all lien claimants have notice of its terms, and are bound thereby; and the contract price, and not the value of the labor performed or materials furnished, is the measure of the owner's liability.[41]

be made payable at least thirty-five days after the final completion of the contract. In this case there is no question but that the contract complied with the said section. Section 1187 provides that the contractor, at any time after the completion of his contract, and until the expiration of sixty days, may file his notice of lien. Reading the two sections together, it is plain that by the terms of the contract at least twenty-five per cent of the contract price must not become due until thirty-five days after its completion, and that at any time after the completion and before the expiration of the sixty days the notice of lien may be filed. In fact, the giving of credit for a longer period would not affect the time within which the notice of lien must be filed. This is shown by § 1190, which provides that suit must be brought to enforce a lien within ninety days after filing the lien, unless by the terms of the contract credit was given, and in such case within ninety days after the expiration of the credit."

As to waiver of mechanic's lien by contract inconsistent with lien, see 1 Am. & Eng. Ann. Cas. 954.

[37] See §§ 214, 259, 264, ante.

[38] See Skym v. Weske Consol. Co. (Cal.), 47 Pac. Rep. 116; Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 569, 42 Pac. Rep. 154.

See "Definition of 'Original Contract,'" § 211, ante.

Material furnished by owner as partial payment on contract price, held valid payment: Dunlop v. Kennedy (Cal.), 34 Pac. Rep. 92 (rehearing granted).

[39] See §§ 31 et seq., ante, and §§ 264 et seq., ante.

[40] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 126, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

Contra, Jones v. Great Southern F. H. Co., 86 Fed. Rep. 370, 30 C. C. A. 108, reversing s. c. 79 Fed. Rep. 477 (C. C.).

As to constitutionality of mechanic's-lien laws, see 4 Am. & Eng. Ann. Cas. 620-622.

[41] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 126, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726. See Hampton v. Christensen, 148 Cal. 729, 735, 84 Pac. Rep. 200.

This provision, however, did not prohibit the owner from contracting to pay the original contractor in anything but money, the provision being, "as to all liens, except that of the original contractor, the contract price shall be payable in money." [42]

§ 281. Same. Contractor's bond. Provision unconstitutional. The provision of the statute [43] requiring the statutory original contract, when filed, to be accompanied by a bond of the contractor, as already shown,[44] after having been declared constitutional, as against the objection that the act should embrace but one subject, to be expressed in the title, and that it was not a special law,[45] was afterwards held to be

[42] In this connection the court said: "Upon a breach of the agreement to pay one hundred and fifty dollars in land, the damages would be liquidated and certain, and precisely the same as they would be in case of the breach of an agreement to pay so much money. The exception in favor of the contractor, in the provision of the code above quoted, indicates, if it does not imply, that he may contract and have a lien for the value of his work, payable otherwise than in money; and this is in perfect accord with § 1183, which provides that he shall have a lien for the value of the labor done and materials furnished. In other states, under statutes not substantially different from our code in this respect, mechanics' liens for the contract price of labor and materials, payable in property, have been enforced, and I have found no case to the contrary (Phillips on Mechanics' Liens, § 129, and authorities cited)": Baird v. Peall, 92 Cal. 235, 237, 28 Pac. Rep. 285. See Schmid v. Busch, 97 Cal. 184, 188, 31 Pac. Rep. 893.

See "Non-Statutory Contract," §§ 259 et seq., ante.

Colorado. It is only in case the owner fails to contract in conformity with the statutory provisions that his liability extends to the value of the material, regardless of the contract price. If he desires to exchange property for his building or improvement, instead of making the cost payable in money, he is not prohibited from so doing. The contract, as between himself and his contractor, will be valid, but he enters into it with full knowledge that in such case the lien claims to which the property may be subjected will be measured by amount in value, and not by contract price: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789.

These doctrines are opposed to the well-considered California cases cited above.

[43] **Kerr's Cyc. Code Civ. Proc., § 1203.**

[44] § 39, ante.

[45] Carpenter v. Furrey, 128 Cal. 665, 668, 61 Pac. Rep. 369.

Colorado. Where a contractor gives a bond to the people of the state, conditioned to discharge, pay, and satisfy all just claims and demands and all expenses incurred in the construction of a public structure and to pay all charges justly made against him in the construction thereof, the people may obtain a judgment for the sum due his subclaimants: People v. Dodge, 11 Colo. App. 177, 52 Pac. Rep. 637 (breach of two or more conditions of bond — misjoinder).

unconstitutional, as against the owner,[46] as well as against the contractor,[47] on the ground that it places an unreasonable restraint upon the owner of property in regard to the use thereof, and the power to make contracts, and as depriving him of his property without due process of law; and the section has been declared not to be effective for any purpose.[48]

§ 282. Same. Effect of giving bond. Common-law obligation. A bond given by the contractor pursuant to section twelve hundred and three, which is thus unconstitutional, is without consideration, and void;[49] and a failure to file the bond as required by the section does not make the original contract void, nor is it followed by any of the consequences denounced in the section.[50] A bond expressly stating that it is given in compliance with section twelve hundred and three cannot be sustained as a voluntary common-law bond;[51] and where the bond does not expressly recite that it is given pursuant to the section, and it yet otherwise appears that it was executed pursuant thereto, it is void, and cannot be en-

[46] Gibbs v. Tally, 133 Cal. 373, 65 Pac. Rep. 970, 60 L. R. A. 815. Some of the reasoning employed in this opinion is erroneous; for instance, the contractor is not personally liable to his subcontractor's material-men, nor to subcontractors in the second degree, and yet such subclaimants might assert a lien against the property of the owner. The owner is not, therefore, the only person against whom the penalty would be visited, as argued. See Stimson M. Co. v. Braun, 136 Cal. 122, 126, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

[47] Shaughnessy v. American S. Co., 138 Cal. 543, 546, 71 Pac. Rep. 701.

[48] San Francisco L. Co. v. Bibb, 139 Cal. 192, 194, 72 Pac. Rep. 964; San Francisco L. Co. v. Bibb, 139 Cal. 325, 72 Pac. Rep. 864; Snell v. Bradbury, 139 Cal. 379, 380, 73 Pac. Rep. 150; W. W. Montague & Co. v. Furness, 145 Cal. 205, 78 Pac. Rep. 640.

[49] Shaughnessy v. American S. Co., 138 Cal. 543, 546, sub nom. Shaunessy v. American S. Co., 69 Pac. Rep. 250.

[50] Snell v. Bradbury, 139 Cal. 379, 380, 73 Pac. Rep. 150.

[51] Shaughnessy v. American S. Co., 138 Cal. 543, 546, sub nom. Shaunessy v. American S. Co., 71 Pac. Rep. 701; San Francisco L. Co. v. Bibb, 139 Cal. 192, 72 Pac. Rep. 964; W. W. Montague & Co. v. Furness, 145 Cal. 205, 78 Pac. Rep. 640.

Hawaii. Seal not necessary: See Campbell v. Manu, 4 Hawn. 459; In re Congdon, 6 Hawn. 633.

Washington. Where a bond contained all the conditions required by 1 Hill's Code, § 2415, a recital that it was taken, not as a statutory, but as a common-law bond, does not vitiate it, and subclaimants may avail themselves of the bond: Baum v. Whatcom Co., 19 Wash. 626, 54 Pac. Rep. 29; State v. Liebes, 19 Wash. 589, 54 Pac. Rep. 26, **overruling**, on this point, Sears v. Williams, 9 Wash. 428, 37 Pac. Rep. 665, 38 Pac. Rep. 135, 39 Id. 280.

Action for failing to take bond under same section: See Rounds v. Whatcom Co., 22 Wash. 106, 60 Pac. Rep. 139.

forced as a common-law obligation.[52] When, however, no reference is made in the bond to section twelve hundred and three, and the bond itself fulfils all the requirements of the law as a common-law bond, it will be upheld as such;[53] and the owner may take such a common-law bond for his own protection.[54]

§ 283. **Same. Previous decisions concerning bond.**[55] The bond provided for in section twelve hundred and three was required to be filed at the same time with the statutory original contract; otherwise no recovery could be had thereon; and it was held the duty of the owner and the contractor to see that the bond was properly filed, and for a failure to do so, subclaimants had their remedy against the owner and contractor for damages.[56]

[52] San Francisco L. Co. v. Bibb, 139 Cal. 192, 72 Pac. Rep. 964; and see San Francisco L. Co. v. Bibb, 139 Cal. 325, 73 Pac. Rep. 864. But see Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74.

[53] Alcatraz M. H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 341, 85 Pac. Rep. 156, 157.

Washington. In a suit on the bond referring to the contract, contract and bond are to be read together: Peters v. Mackay, 20 Wash. 172, 54 Pac. Rep. 1122.

[54] Hampton v. Christensen, 148 Cal. 729, 735, 84 Pac. Rep. 200.

[55] **Bond held insufficient,** under § 1203, when given to "F. [the owner], his legal representatives or assigns," and not in terms inuring to the benefit of any one else: See Gibbs v. Tally (Cal.), 63 Pac. Rep. 168 (reversed, 133 Cal. 373, 69 Pac. Rep. 970).

Complaint in action on bond: See Carpenter v. Furrey, 128 Cal. 665, 669, 61 Pac. Rep. 369.

Limitation of action on bond: See Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74.

Action for damages for failure to file bond: See Gibbs v. Tally, 133 Cal. 373, 69 Pac. Rep. 970, 63 Pac. Rep. 168, 60 L. R. A. 815 (measure of damages; action for damages not affected by bringing action to foreclose lien).

The bond is collateral obligation, enforceable by subclaimants only to the extent that their claims could have been enforced against the contractors: Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74.

As to § 1203, repealed by act requiring contractors to give bonds to secure the claims of material-men and others employed upon state, municipal, and others public works (Stats. 1897, p. 201, **Henning's General Laws,** p. 1104), see Union S. M. Works v. Dodge, 129 Cal. 390, 394, 62 Pac. Rep. 41. The latter act is independent of the general mechanic's-lien law: French v. Powell, 135 Cal. 636, 639, 68 Pac. Rep. 92.

Bond given by contractor on public-school house, under § 1203, **Kerr's Cyc. Code Civ. Proc.,** held valid: Union S. M. Works v. Dodge, 129 Cal. 390, 394, 62 Pac. Rep. 41.

[56] Mangrum v. Truesdale, 128 Cal. 145, 146, 60 Pac. Rep. 775, **distinguishing** Kiessig v. Allspaugh, 91 Cal. 236, 27 Pac. Rep. 662, 99 Cal. 453, 34 Pac. Rep. 106.

Sureties on the bond given under section twelve hundred and three could not object to their own failure to justify, as required by section ten hundred and fifty-seven of the Code of Civil Procedure, that provision being for the benefit of the obligees;[57] and neither demand nor notice was required in an action on such bond.[58]

In a suit on such bond, in which the questions of the constitutionality of section twelve hundred and three of the Code of Civil Procedure, relating thereto, and the validity of the obligation upon which the action was brought, were directly presented, argued by counsel, and decided by the court, on a former appeal, on which it was held that the bond in question derives force from its provisions, and not from the statute, and that it may be enforced as a voluntary common-law obligation, without reference to the constitutionality of the law, the opinion of the first appeal was res adjudicata, and was the law of the case, and not obiter, but binding in the same case upon a later appeal.[59]

§ 284. Provisions avoiding certain clauses. Impairment of liens. Statutory provision. The mechanic's-lien law[60] provides: "It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of

[57] Carpenter v. Furrey, 128 Cal. 665, 669, 61 Pac. Rep. 369.

[58] Carpenter v. Furrey, 128 Cal. 665, 667, 61 Pac. Rep. 369.

[59] People's L. Co. v. Gillard (Cal. App., April 24, 1907), 90 Pac. Rep. 556, s. c. 136 Cal. 55, 57, 68 Pac. Rep. 576.

Washington. Held that act of 1893, ch. xxiv, p. 32, § 1, requiring railroad company to file a bond with auditor, does not mean that when a railroad company fails to take a bond, an action will lie directly against the company, and that no notice of liens, as required by the statute, are necessary, but merely means that railroad property is excepted from liens where the specific security is taken, and a failure to take the bond not only subjects the property to a lien, but the railroad company is also made personally liable in an action for the enforcement of the lien, as additional security: Laidlaw v. Portland V. & Y. R. Co., 42 Wash. 292, 84 Pac. Rep. 855 (act held constitutional as against objection to title). See also Armour v. Western Const. Co., 36 Wash. 529, 78 Pac. Rep. 1106.

Action on contractor's bond for a public improvement, under Ballinger's Ann. Codes and Stats., § 5925: Huggins v. Sutherland, 39 Wash. 552, 82 Pac. Rep. 112; Crane Co. v. Ætna L. Co. (Wash.), 86 Pac. Rep. 849.

[60] Kerr's Cyc. Code Civ. Proc., § 1201.

other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void." [61]

§ 285. **Same. Provision, when not applicable.** This provision does not apply to an instalment payable at the completion of the building, nor to the waiver of the certificate as evidence of such completion; the payment of such instalment does not affect or impair any claim or lien of a claimant, whose right would not be different if the payment had not been made until two days later, when the certificate was given.[62]

In the case of a non-statutory contract, it has been shown that premature payments may be made, and that, at least as far as regards the rights of claimants under notice of their claims to the owner, when nothing is due to the contractor, the section has no application.[63]

[61] **Waiver or impairment of liens by matters dehors the contract** will be considered later.

See, generally, note 19 Am. St. Rep. 699. See also Russ L. Co. v. Garrettson, 87 Cal. 589, 593, 25 Pac. Rep. 747.

Utah. See Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764 (1888).

[62] Valley L. Co. v. Struck, 146 Cal. 266, 271, 80 Pac. Rep. 405.

[63] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 245, 65 Pac. Rep. 378. See § 266, ante.

CHAPTER XVI.

BUILDING CONTRACTS (CONTINUED).

B. Statutory Requirements Essential to Validity of Contract.

§ 286. Scope of discussion.
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§ 288. What not essential to validity of contract.
§ 289. Construction of provision.
§ 290. Statutory original contract must be entered into before work is commenced.
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§ 313. Place of filing contract or memorandum.
§ 314. Conspiracy as to contract price.

B. STATUTORY REQUIREMENTS ESSENTIAL TO VALIDITY OF CONTRACT.

§ 286. Scope of discussion. The expression "statutory original contract," as used in this book, has already been defined.[1]

[1] See § 214, ante.

The discussion in this chapter has no application to contracts other than "statutory original contracts," and therefore does not apply to "non-statutory original contracts," such as implied contracts, or contracts where the price does not exceed one thousand dollars, nor to contracts for street-work, etc., under the provisions giving a lien therefor.[2]

§ 287. Statutory provision. Code section eleven hundred and eighty-three[3] provides: "In case of a contract for the work between the reputed owner and his contractor, the liens shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price, and after all such liens are satisfied, then as a lien for any balance of

Colorado. The effect of failing to comply with the provisions of the statute with reference to statutory original contracts is not to render the contract void, but simply to give a lien independently of the contract, for the value of the labor or materials (3 Mills's Ann. Stats., 2d ed., § 2867,.

[2] **Kerr's Cyc. Code Civ. Proc., § 1191.** See Kreuzberger v. Wingfield, 96 Cal. 251, 257, 31 Pac. Rep. 109.

And see §§ 211, 214, 259-263, ante.

Colorado. Many of the provisions of §§ 1 and 2, Laws 1899, pp. 261, 265, 3 Mills's Ann. Stats., 2d ed., §§ 2867, 2868, being identical with §§ 1183 and 1184 of the Code of Civil Procedure of California, may be interpreted in the light of the California decisions.

It must be remembered, however, that while the statutory original contract in this state must contain provisions similar to those required under the California statute, a failure to comply with the statute does not render the contract void.

Recordation of original contract. When required. The statute requiring certain original contracts to be recorded and to be of a certain form to enable the contractor to secure a lien for himself and to permit the owner to confine the liability to which his property may be subjected to the contract price, does not prohibit them from entering into another and different contract. Subclaimants are not bound by the terms of a non-statutory original contract, and a contract varying in important particulars from the contract the terms of which are contained in the statute, affects the rights of subclaimants, whether they have notice or knowledge of the terms of such contract or not: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786 (Laws 1893, ch. cxvii, p. 313); and subclaimants are not bound by the statutory original contract upon failure of owner or contractor to file properly such a contract: Chicago L. Co. v. Newcomb, supra.

[3] **Kerr's Cyc. Code Civ. Proc., § 1183,** as amended March 15, 1887. This amendment inserted the word "reputed" before "owner," among other things. Whether these provisions are only applicable to cases where the "reputed owner" contracts with the contractor does not seem to have had the attention of the courts: See Dunlop v. Kennedy (Cal.), 34 Pac. Rep. 92.

Amendments of 1899 and 1903 did not affect these provisions.

the contract price in favor of the contractor. All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto; and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing; otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

The requirements of the statutory original contract, briefly stated, are: 1. It must be in writing; 2. It must be subscribed by the parties thereto; 3. The said contract, or the memorandum designated in the statute, must be filed before the work is commenced, because the clause in the extract above quoted from section eleven hundred and eighty-three, commencing " setting forth the names of all the parties," etc., modifies the word " memorandum," and not the word " contract," preceding it.[4] It is assumed, of course, that the elements of a common-law contract exist.

§ 288. What not essential to validity of contract. While the statute requires certain essentials to exist in order that a statutory original contract may be valid, it is obvious that no other than such requirements are necessary to its validity; upon no other default does the statute declare the contract void.[5] The provision in section eleven hundred and eighty-three does not require, and it is not necessary to effect its

[4] Snell v. Bradbury, 139 Cal. 379, 381, 382, 73 Pac. Rep. 150.
[5] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 578, 27 Pac. Rep. 431.

purpose, that the statutory original contract shall show on its face the total amount to be paid thereunder, nor whether the amount is greater or less than one thousand dollars. Such requirement applies only to the memorandum; and because the memorandum must state the "total amount to be paid," it is not a necessary inference, equivalent to a statutory command, that the contract shall also state that amount, either in one sum or in detail. The legislature assumed that building contracts would ordinarily recite the whole contract price, and in that view enacted the provision concerning the memorandum. The contract can state the instalments, if any, and the twenty-five per cent payment thirty-five days after completion, without stating either the amount of each payment or the total amount of them all; and in order to avoid the imposition of a penalty, the foregoing construction was adopted by the supreme court.[6] Neither does the statute make the statutory original contract void by reason of its not containing a description of the property upon which the building is to be erected;[7] although the memorandum of the contract is required to contain such a description of the property to be affected thereby.[8]

§ 289. **Construction of provision.** The statute, imposing, as it does, a liability upon the owner beyond the price he contracted to pay, in favor of a subcontractor with whom he has no contract relations, is penal as well as remedial, and therefore, whilst it must have such construction as will reasonably effectuate its remedial purposes, must be strictly confined to such purpose. No merely technical construction can be indulged for the purpose of visiting a penalty upon the owner, unless there has been a substantial failure to comply with the law, such as, if continued, would defeat the remedial purposes of the statute; but if there be a reasonable doubt as to

[6] Snell v. Bradbury, 139 Cal. 379, 381, 382, 73 Pac. Rep. 150.

[7] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 578, 27 Pac. Rep. 431; Yancy v. Morton, 94 Cal. 558, 561, 29 Pac. Rep. 1111. But see dictum in Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932.

[8] **Kerr's Cyc. Code Civ. Proc.**, § 1184.

See "Memorandum," §§ 300 et seq., post.

It thus appears that the memorandum should contain matters which may not be contained in the original contract.

the construction of the statute, or as to whether the defendant complied with the contract, the owner should have the benefit of the doubt.[9]

§ 290. **Statutory original contract must be entered into before work is commenced.** Under the provisions of the mechanic's-lien law, the statutory original contract is required to be entered into before the commencement of work on the building or other improvement; and a statutory original contract entered into between the owner and the contractor after the commencement of the work is void as to all sublien-holders, whether before or after the commencement of the work.[10]

§ 291. **Same. Estoppel as to invalidity of contract.** Where the original statutory contract is invalid by reason of the parties to such contract having failed to sign the plans and specifications under and in accordance with which the building or other improvement is to be made, although such plans and specifications are referred to in and attached to the written contract, the material-man is not estopped from claiming that the contract is void by reason of the fact that he has contracted to furnish the lumber for such improvement, and has rendered one bill with express reference to the plans and specifications.[11]

§ 292. **The statutory original contract must be in writing.** The provision of the mechanic's-lien law requiring a writing applies only to statutory original contracts.[12] If the

[9] Joost v. Sullivan, 111 Cal. 286, 296, 43 Pac. Rep. 896.

See "Construction," §§ 24-27, ante, and "Effect of Non-compliance," §§ 315 et seq., post.

[10] Stimson M. Co. v. Nolan (Cal. App., Aug. 17, 1907), 91 Pac. Rep. 262.

[11] The court said, however: "They probably did not then know that the contract was void. They have not misled the defendants, nor induced them to change their position, and it does not appear that they have expressed knowledge of the invalidity while dealing with the contractor": West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533.

[12] **Kerr's Cyc. Code Civ. Proc.**, § 1183, and note; Madera F. & T. Co. v. Kendall, 120 Cal. 182, 52 Pac. Rep. 304, 65 Am. St. Rep. 117; Sidlinger v. Kerkow, 82 Cal. 42, 44, 22 Pac. Rep. 932. See Rebman v. San Gabriel Valley L. & W. Co., 95 Cal. 390, 393, 30 Pac. Rep. 564; Kreuzberger v. Wingfield, 96 Cal. 251, 257, 31 Pac. Rep. 109; Barber v. Rey-

writing signed by the parties does not of itself determine what constitutes the contract, then it is not wholly in writing, as is required, and cannot, as a whole, be filed in the recorder's office.[13]

When the plans and specifications are referred to in the contract as having been signed by the parties to the contract, when in fact they were not so signed, the contract is inchoate.[14]

Contract referring to adjoining house as pattern. A building contract, otherwise valid, is not rendered void because of a reference therein to an adjoining house and certain work therein as patterns and samples for corresponding work provided for in such contract, instead of setting forth in detail, in plans and specifications, the work to be done and then referring to such plans and specifications.[15]

nolds, 44 Cal. 519, 533, s. c. 33 Cal. 497, 502 (under § 2 of the act of 1862, requiring building contracts for a price of over two hundred dollars to be in writing, etc., otherwise they were void).

See "Alterations," §§ 326 et seq., post.

Colorado. A contract by which the owner of a mining claim agrees to sell an interest therein, in consideration of the expenditure of a certain sum for its development, is not within § 1, p. 316, Laws 1893, and the contract need not be recorded: Maher v. Shull, 11 Colo. App. 322, 52 Pac. Rep. 1115.

[13] **"What occurred after the contract was signed, by way of putting it beyond doubt** as to what plans and specifications were intended, such as by attaching them together and filing them as one document, and building a house upon the lots indicated, according to the plans and specifications, can have no bearing upon the question whether the whole contract was reduced to writing and signed by the parties. The reference is to specifications signed by the parties. . . . Under general rules pertaining to contracts, one could make a builder's contract so referring to plans and specifications as to give very little information as to what the contractor had agreed to do, unless the plans and specifications can be found. The material part of the contract may really be in them. Independently of the statute, one might agree to build in San Diego a house which should in all respects be a duplicate of a designated house in London. Such a contract would not help persons who proposed to furnish material, or perform labor upon the house. Not much more satisfaction would be afforded by placing on file plans and specifications which, when found, do not accord with the reference made in the written contract. And certainly it cannot be contended that in such case the plans and specifications have been so referred to as to become part and parcel of the contract signed by the parties": West Coast L. Co. v. Knapp, 122 Cal. 79, 83, 54 Pac. Rep. 533, 534. See Donnelly v. Adams, 127 Cal. 24, 25, 59 Pac. Rep. 208.

See § 208, ante, and §§ 309, 310, post.

[14] Donnelly v. Adams, 115 Cal. 129, 46 Pac. Rep. 916, 127 Cal. 24, 59 Pac. Rep. 208.

[15] California I. Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. Rep. 346, 617.

§ 293. **The statutory original contract must be subscribed.** The mechanic's-lien law [16] requires that the statutory original contract "shall be subscribed by the parties thereto." [17] The contract is not void, where it recited the construction of a building conformable to certain drawings and specifications "signed by the parties and hereunto annexed," and the contract consisted of three items or parts fastened together in the following order: 1. The formal contract, signed on the last page thereof by the parties; 2. The specifications, signed only by the owner; and 3. The drawings or plans, the last or bottom sheet of which was signed by the contractor and owner.[18]

[16] **Kerr's Cyc. Code Civ. Proc.,** § 1183, and note.

[17] Joost v. Sullivan, 111 Cal. 286, 294, 43 Pac. Rep. 896.

It was held by the commissioners, in Dunlop v. Kennedy (Cal.), 34 Pac. Rep. 92, that the statute does not require that the contract shall be signed by the owner, and that it is sufficient if it is signed by the "reputed owner": See §§ 28 et seq., § 287, and note, ante; but this case was subsequently heard in bank, and the decision of the commissioners reversed, this question being eliminated from the inquiry: Dunlop v. Kennedy, 102 Cal. 443, 36 Pac. Rep. 765. See Donnelly v. Adams, 127 Cal. 24, 25, 59 Pac. Rep. 208.

Compare Kerr's Cyc. Civ. Code, §§ 1276, 1624, and notes.

As to signing plans and specifications referred to in the contract, under § 1183½, Code Civ. Proc. (repealed, Stats. 1903, p. 21), see Sullivan v. California R. Co., 142 Cal. 201, 203, 204, 75 Pac. Rep. 767.

[18] **Signing. Drawings and specifications.** In Howe v. Schmidt, 151 Cal. 436, 438, 90 Pac. Rep. 1056, the court said: "The contention is that the reference in the contract being to drawings and specifications 'signed by the parties,' as well as annexed, the failure of one of the parties to place his signature somewhere upon the specifications made it impossible to identify the specifications intended, except by the aid of oral evidence, and rendered the contract void. We see no good reason, however, for holding that this reference to the 'drawings and specifications, . . . signed by the parties and hereunto annexed,' is not fully satisfied by pages of specifications and sheets of drawings fastened together and annexed to the contract, and signed on the last page thereof by the parties. So fastened together and annexed to the contract, the drawings and specifications in fact constituted one document, fully identified as to the signatures of the parties in the manner required by the contract by the signatures on the last page. This being the situation, it is unnecessary to determine what would have been the effect had the drawings and specifications been simply 'annexed,' without any compliance with the requirement as to signing, and the cases cited by appellants in support of their claim are inapplicable. Worden v. Hammond, 37 Cal. 61, was a case where the agreement was to build according 'to the draft, plan, and explanation hereto annexed, marked "A,"' and no draft, plan, or explanation was attached, and it was sought to show by parol that an original paper produced by plaintiff was the one referred to. It was held that, where the reference is false, it cannot be helped out by oral evidence; the court saying that if the written

The actual time of signing is immaterial, where limited to work done after the signing; but the dates attached to the signatures of claimants, whether they are the true dates when the signatures were written or not, are, in the absence of satisfactory evidence to the contrary, conclusive evidence that the labor performed after that date was done under its terms and conditions.[19]

§ 294. **Filing contract.**[20] Before the work is commenced, either the statutory original contract,[21] or a sufficient mem-

contract had contained a reference to the specifications in such a manner that their connection would be apparent upon their production, it would be regarded as a sufficient compliance with the statute. San Francisco L. Co. v. O'Neil, 120 Cal. 455, 52 Pac. Rep. 728, was a case where the contract was held void, simply because the entire contract was not filed as required by law; a sun-print copy of the plans and drawings having been filed instead of the original. West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533, was a case where the drawings and specifications were referred to simply as 'identified by the signatures of the parties,' and no plans and specifications corresponding to this reference were produced. In Donnelly v. Adams, 115 Cal. 129, 46 Pac. Rep. 916, the only reference was to 'plans, drawings, and specifications, . . . made by C. E. Henriksen, . . . and which are signed by the parties hereto, and are to be kept and remain in the office of said architect,' and there were no signed plans and specifications. In Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. Rep. 629, the contract provided that the work should be done 'conformable to the drawings and specifications made by R. B. Young, architect, and signed by the parties, and hereto annexed,' and no plans and specifications were in fact annexed. None of these cases lend support to the contention that the plans and specifications annexed to the contract in this case did not fully correspond with the reference."

[19] Skym v. Weske Consol. Co. (Cal.), 47 Pac. Rep. 116.

[20] **Failure to file contract to build extension of railroad. Avoiding same:** Bringham v. Knox, 127 Cal. 40, 59 Pac. Rep. 198.

[21] **Kerr's Cyc. Code Civ. Proc.,** § 1183, and note. See Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 196, 20 Pac. Rep. 419, s. c. 97 Cal. 263, 266, 32 Pac. Rep. 172; Willamette S. M. L. & M. Co. v. Kremer, 94 Cal. 205, 207, 29 Pac. Rep. 633; Joost v. Sullivan, 111 Cal. 286, 293, 43 Pac. Rep. 896; Coss v. MacDonough, 111 Cal. 662, 667, 44 Pac. Rep. 325; Booth v. Pendola, 88 Cal. 36, 41, 25 Pac. Rep. 1101, 24 Pac. Rep. 714; Morris v. Wilson, 97 Cal. 644, 645, 32 Pac. Rep. 801; Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep. 840; San Francisco L. Co. v. O'Neil, 120 Cal. 455, 456, 52 Pac. Rep. 728; West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533, 534; Laidlaw v. Marye, 133 Cal. 170, 173, 65 Pac. Rep. 391; Bringham v. Knox, 127 Cal. 40, 59 Pac. Rep. 198. But see Dunlop v. Kennedy (Cal.), 34 Pac. Rep. 92 (rehearing granted, and decision reversed).

See Kiessig v. Allspaugh, 91 Cal. 234, 236, 27 Pac. Rep. 662, 13 L. R. A. 418; White v. Fresno Nat. Bank, 98 Cal. 166, 168, 32 Pac. Rep. 979; Gnekow v. Confer (Cal.), 48 Pac. Rep. 331; McMenomy v. White, 115 Cal. 339, 342, 47 Pac. Rep. 109; Macomber v. Bigelow, 123

orandum thereof,[22] must be filed with the county recorder; otherwise the contract is void.[23]

The contract need not be recorded, under the California statute, as there is no provision therein for recording the same. Nearly every opinion of the California courts relating to the subject states that the contract must be "recorded," otherwise it is void. This looseness of expression is entirely unwarranted, as the statute[24] expressly provides that the contract or memorandum shall be merely "filed" with the recorder.[25]

§ 295. **The duty of filing the contract** rests upon all the parties thereto,[26] and it is as important for the owner as for the contractor to see that it is filed, since, on failure to file, the obligations of the former to subclaimants are not limited to the contract price, and as to the latter, his lien is lost.[27] But the duty to file the contract is primarily on the contractor, for the reason that he can always defeat the law and the owner's interest by commencing work before such filing, the owner being helpless in the matter.[28]

§ 296. **Necessity and object of filing contract.** While the filing of the contract is for notice, yet it is not for that purpose merely; it is one of the essentials to a valid original

Cal. 532, 56 Pac. Rep. 449; California I. Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. Rep. 346, 617; Camp v. Behlow, 2 Cal. App. 699, 700, 84 Pac. Rep. 251; Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, 32, 74 Pac. Rep. 357; Jones v. Kruse, 138 Cal. 613, 614, 72 Pac. Rep. 146 (prior to amendment of § 1187, March 27, 1897).

[22] **Kerr's Cyc. Code Civ. Proc.,** § 1183, and note; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 233, 29 Pac. Rep. 629; Joost v. Sullivan, 111 Cal. 286, 293, 43 Pac. Rep. 896.

See "Memorandum," §§ 300-311, post.

[23] See "Effect of Non-compliance," §§ 315 et seq., post.

Colorado. In this state, those performing labor or furnishing materials before the contract is filed will have a lien, independently of the contract: Laws 1899, § 1, pp. 261, 262; 3 Mills's Ann. Stats., 2d ed., § 2867.

[24] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[25] **Colorado.** But, as to this state, see Laws 1899, § 1, pp. 261, 262; 3 Mills's Ann. Stats., 2d ed., § 2867.

[26] Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 197, 20 Pac. Rep. 419; Laidlaw v. Marye, 133 Cal. 170, 175, 65 Pac. Rep. 391.

[27] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 233, 29 Pac. Rep. 629. See §§ 81, 127, 130, ante; Laidlaw v. Marye, 133 Cal. 170, 175, 65 Pac. Rep. 391, Los Angeles P. B. Co. v. Higgins (Cal. App., Aug. 8, 1908), 7 Cal. App. Dec. 164.

[28] Laidlaw v. Marye, 133 Cal. 170, 175, 65 Pac. Rep. 391.

statutory contract. By the express provision of the statute, a failure to file the contract renders the statutory original contract void.[29]

The object of the statute in requiring contracts of an agreed price in excess of one thousand dollars to be filed seems to be twofold: 1. As a security to the owner, who is thereby shielded from liability to subcontractors, contractors, laborers, and material-men, beyond his contract price; 2. To afford information to all others furnishing materials or performing services in and about the contemplated improvement upon which to predicate an opinion, founded upon the value of the property, the price to be paid, and the dates of payment, as to whether or not the contract price is such as will probably be adequate security, together with the lien therefor given to them by the statute, sufficient to warrant them in bestowing their labor or furnishing materials for the proposed improvement. Manifestly, if the improvement, when completed, taken with the property upon which it is situated, is of a character having no extrinsic or market value, as, for instance, a mill for crushing quartz-rock, where there is not, and cannot be, any quartz-rock to crush, or if the property be valueless, and the price agreed to be paid be far below the value of the work to be done, it is of the utmost importance that these facts shall be known to those about to become interested.[30]

A further object of filing the contract, it may be added, is to give a test of the completion of the contract or build-

[29] Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589; Butterworth v. Levy, 104 Cal. 506, 510, 38 Pac. Rep. 897.

Contractual relations of parties not affected; contractor may sue upon the contract, but cannot claim lien: Los Angeles P. B. Co. v. Higgins (Cal. App., Aug. 8, 1908), 7 Cal. App. Dec. 164.

[30] **Substantially in the language of Greig v. Riordan,** 99 Cal. 316, 319, 33 Pac. Rep. 913. See San Francisco L. Co. v. O'Neil, 120 Cal. 455, 457, 52 Pac. Rep. 728, in which the court say: "While the mechanic's-lien law certainly interferes to a great extent with the right of the property-owner to contract according to his own best judgment for the erection of improvements thereon, still it is apparent that the property-owner might take advantage of mechanics and laborers by making a contract with a contractor financially irresponsible for the construction of a house actually worth twice the amount of the named contract price."

Colorado. See Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 790.

ing, so that claimants may know when to file their claims of lien.[31]

§ 297. **Whole contract must be filed.** Where the statutory original contract is filed, the whole of it must be filed.[32] It is a compliance with the statute if the contract filed be sufficient, under the ordinary rules of law, to constitute a written contract.[33]

§ 298. **Same. Reference to matters dehors the contract** do not necessarily make the contract void, provided it is not a reference to another writing.[34] Thus a reference to patterns, in an adjoining house, for samples of the work to be performed, has been held to be a peculiarly satisfactory mode of specification.[35]

§ 299. **Same. Where the plans and specifications are referred to,** and form a part of the building contract, they

[31] Barker v. Doherty, 97 Cal. 10, 12, 31 Pac. Rep. 1117.

See "Time of Completion," §§ 334 et seq., post, and "Filing Claim," §§ 416 et seq., post.

[32] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 234, 29 Pac. Rep. 629; Donnelly v. Adams, 127 Cal. 24, 25, 59 Pac. Rep. 208.

See California I. Const. Co. v. Bradbury, 138 Cal. 328, 71 Pac. Rep. 346, 617.

[33] California I. Const. Co. v. Bradbury, 138 Cal. 328, 331, 71 Pac. Rep. 346, 617.

Executed transaction, antecedent to the contract as executed, and forming no part of it, although referred to in the specifications: See California I. Const. Co. v. Bradbury, 138 Cal. 328, 330, 71 Pac. Rep. 617.

[34] California I. Const. Co. v. Bradbury, 138 Cal. 328, 331, 71 Pac. Rep. 346, 617.

See § 292, ante.

[35] **In California I. Construction Co. v. Bradbury,** 138 Cal. 328, 331, 71 Pac. Rep. 346, 617, the court say: "Nor do we think the objection tenable that the old house thereby became part of the contract, and hence that the whole contract was not filed in the recorder's office. All written contracts refer to matters dehors the instrument, but such matters (except where, as in West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533, the matter referred to is another writing) do not become a part of the instrument. Thus monuments and natural objects called for in a deed cannot with any propriety be said to be part of the deed; nor where goods are sold or contracted to be sold by sample can the sample be said to be part of the contract, though conformity to sample doubtless is. Nor is the case different here, where work is contracted to be done according to a specified pattern or sample."

must be filed in the office of the recorder as a part of the contract.[36] The rule is the same, where the plans and specifications are referred to as being in the office of the architect;[37] and likewise where the contract simply refers to the plans and specifications.[38] The fact that the contract does not state, in terms, that the plans, drawings, and specifications were annexed to it and made a part of it is no excuse for lack of filing, where they constitute an essential part of it.[39]

When contract refers to plans and specifications as signed by the parties, and they are not so signed, the statement is a misreference or misdescription that cannot be cured by any oral waiver or oral agreement. The plans and specifications in such a case are a most important part of the contract, for, without them, the nature and extent of the work and materials to be furnished cannot be ascertained, and they should, under such circumstances, be made a part

[36] Holland v. Wilson, 76 Cal. 434, 436, 18 Pac. Rep. 412; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 233, 29 Pac. Rep. 629; Yancy v. Morton, 94 Cal. 558, 562, 29 Pac. Rep. 1111; Barker v. Doherty, 97 Cal. 10, 31 Pac. Rep. 1117; Summerton v. Hansen, 117 Cal. 252, 253, 49 Pac. Rep. 135; Kuhlman v. Burns, 117 Cal. 469, 49 Pac. Rep. 585.

See "Memorandum," §§ 300 et seq., post.

[37] Greig v. Riordan, 99 Cal. 316, 320, 33 Pac. Rep. 913; Pierce v. Birkholm, 115 Cal. 657, 660, 47 Pac. Rep. 681. See Donnelly v. Adams, 115 Cal. 129, 130, 46 Pac. Rep. 916. See §§ 192, 292, ante, and § 307, post.

See also White v. Fresno Nat. Bank, 98 Cal. 166, 168, 32 Pac. Rep. 979, where it was held that it was too late to raise the question for the first time on appeal, no demurrer having been interposed, the answer admitting the contract set out in the complaint, and the contract itself being introduced in evidence without objection.

[38] McMenomy v. White, 115 Cal. 339, 341, 47 Pac. Rep. 109. See authorities in foot-note 37, ante.

Filing copy of contract. In San Francisco L. Co. v. O'Neil, 120 Cal. 455, 456, 52 Pac. Rep. 728, it was held that § 1183 of the Code of Civil Procedure makes no provision for the filing of a copy of the contract, or of any part thereof, and the court say: "It is the established law that where the plans and specifications are part of the contract, they must be filed." The contract in this case stated that the contractor agreed to construct a certain building "in conformity with the plans, drawings, and specifications for the same made by D., the authorized architect, . . . which are signed by the parties hereto, and are to be kept and remain in the office of said architect, . . . in addition to which a duplicate copy of said plans and specifications is to be filed in the county recorder's office." The question whether the contract filed would have been sufficient as a memorandum was not decided.

See "Memorandum," § 309, post.

[39] Pierce v. Birkholm, 115 Cal. 657, 661, 47 Pac. Rep. 681. See Kuhlman v. Burns, 117 Cal. 469, 472, 49 Pac. Rep. 585.

of the written contract, which is signed by the parties in such a way that no resort to oral evidence is necessary to show that it was the intention of the parties that they should be a part of such contract; otherwise the contract is void.[40]

In order that there may be a sufficient filing of the contract, it seems that no part of it can be a copy; for instance, a copy of the plans and specifications. If the contract is filed, it must be the whole original contract.[41]

§ 300. Memorandum of contract. Statutory provision. The mechanic's-lien law [42] provides: "And the said contract, or a memorandum thereof, setting forth the [1] names of all the parties to the contract, [2] a description of the property to be affected thereby, [3] together with a statement of the general character of the work to be done, [4] the total amount to be paid thereunder, and [5] the amounts of all partial payments, [6] together with the times when such payments shall be due and payable, shall, [7] before the work is commenced, be [8] filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing." [43]

§ 301. Same. General effect of provision. In 1887, the legislature amended this section, as it is set forth in the preceding section, by providing that instead of filing the contract in the recorder's office, as had been previously required, a memorandum thereof might be filed. After this amendment was made, the owner or contractor could satisfy

[40] Donnelly v. Adams, 127 Cal. 24, 25, 59 Pac. Rep. 208.

[41] San Francisco L. Co. v. O'Neil, 120 Cal. 455, 456, 52 Pac. Rep. 728. In that case the question of whether a copy of the contract might be treated as a memorandum was not involved, and was not decided. See Blinn L. Co. v. Walker, 129 Cal. 62, 65, 61 Pac. Rep. 664.

See foot-note 38, ante, this chapter.

[42] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[43] **Before amendment of 1887** to this section, the statute imperatively demanded that the contract should be filed: Joost v. Sullivan, 111 Cal. 286, 294, 43 Pac. Rep. 896.

Oregon. Under act of 1874, where there was no written contract, the right to a lien attached only in case the person erecting the building refused to furnish a memorandum in writing of the terms of the contract: Tatum v. Cherry, 12 Oreg. 135, 6 Pac. Rep. 715.

the statute by filing either the contract or such memorandum; but if he filed the contract, he must still file the whole of it, including the drawings and specifications, if they were made a part thereof; while if he preferred to file the memorandum, such memorandum must contain the matters which are prescribed in the statute as the equivalent of the contract.[44]

§ 302. **Same. Purpose and object.** It is apparent that the design of the amendment was to require less than was required before. How much less, must be determined from the language used, construed in the light of the purpose to be effected by the filing of anything giving information of the contract and the original contractor.[45]

The objects of filing the memorandum seem to be the same as those of filing the contract.[46]

§ 303. **Same. What not required in memorandum.** What the statute does not expressly require to be stated in the memorandum need not be stated therein. Thus the statute does not require the memorandum to be signed;[47] nor was it necessary that the signatures to the plans and drawings should be copied into the memorandum, to make it sufficient, the drawings and specifications being signed by the parties, as appeared by the recital in the copy of the articles of agreement, which constituted a part of the memorandum filed.[48]

§ 304. **Same. Contract, or copy thereof, as memorandum. General principles.** The claim is frequently made that an insufficient filing of a contract is a sufficient filing of a memorandum thereof. It is evident that a memorandum sufficient under the statute could not cure a contract void

[44] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 235, 29 Pac. Rep. 629.

[45] Joost v. Sullivan, 111 Cal. 286, 295, 43 Pac. Rep. 896.

[46] See § 296, ante.

[47] Blinn L. Co. v. Walker, 129 Cal. 62, 65, 61 Pac. Rep. 664; Joost v. Sullivan, 111 Cal. 286, 294, 43 Pac. Rep. 896.
See § 305, post.

[48] Blinn L. Co. v. Walker, 129 Cal. 62, 66, 61 Pac. Rep. 664.

for non-compliance therewith.[49] It is equally clear that if the original contract itself is filed, and it is insufficient as such contract under the statute, it would avail nothing as a memorandum, even though it expressed every requirement of the statute as a memorandum; for the statute does not demand that the contract and memorandum thereof shall set forth the same facts or be made in the same form. If, however, a copy of the original contract, or what purports to be a copy thereof, is filed, and the same is sufficient as a memorandum, containing the matters and in the form set forth in the statute, and there exists, independently thereof, an original contract, of which the instrument filed purports to be a copy, whether it is a copy or not, the statute is satisfied in this regard. Where there was nothing in the memorandum, except the style of the writing, to indicate that it was a copy of anything, its language, though reading like a contract, must be deemed that of a memorandum or statement of the substance of the contract.[50]

§ 305. **Same. Names of all the parties to the contract.** It is not necessary that the memorandum shall be signed or subscribed by the parties. The statute only requires that the memorandum shall "set forth the names of all the parties to the contract." [51]

[49] In this connection, Mr. Justice Harrison, speaking for the court, said: "Whether the document which was filed in the recorder's office is to be regarded as the original contract, or as a memorandum thereof, is immaterial. A memorandum of the contract can have no higher force than the contract itself, and if the contract fails to comply with the requirements of the statute, the memorandum itself must be equally insufficient": Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 235, 29 Pac. Rep. 629. It is submitted that this language is not quite accurate, and that the text more correctly states the law. See Greig v. Riordan, 99 Cal. 316, 320, 33 Pac. Rep. 913; San Francisco L. Co. v. O'Neil, 120 Cal. 455, 457, 52 Pac. Rep. 723; Blinn L. Co. v. Walker, 129 Cal. 62, 66, 61 Pac. Rep. 664.

[50] Blinn L. Co. v. Walker, 129 Cal. 62, 66, 61 Pac. Rep. 664 (concurring opinion). "We can hardly conceive of a more complete memorandum of a contract than is to be found in a verbatim copy of it": Blinn L. Co. v. Walker, 129 Cal. 62, 65, 61 Pac. Rep. 664. This dictum is not in consonance with the authorities, nor in accord with the requirements as to the memorandum, which, under § 1183, as already shown (§§ 287, 288, ante), is required to contain matters not required by the statute to be placed in the contract.

[51] Joost v. Sullivan, 111 Cal. 286, 294, 43 Pac. Rep. 896; Blinn L. Co. v. Walker, 129 Cal. 62, 65, 61 Pac. Rep. 664.

See § 303, ante.

§ 306. Same. Description of the property to be affected thereby. The statutory provision [52] requires the memorandum to contain a "description of the property to be affected thereby." Section eleven hundred and eighty-seven [53] requires the claim of lien to contain a "description of the property to be charged, sufficient for identification." The previous discussion of the latter section may have some bearing upon the former.[54] At any rate, where the description contained in the memorandum was such that, by the instrument itself, and without the aid of oral evidence, the building, and property on which it was situated, and necessary for the convenient use of such building, could have been identified on the ground, it was held sufficient.[55]

§ 307. Same. Statement of the general character of the work to be done. The statute [56] requires that the memorandum filed shall set forth the names, etc., "together with a statement of the general character of the work to be done." [57] If the statute had omitted the words last above quoted, and had simply said that the contract, or a memorandum of it, should be filed, it would have been understood that the word "memorandum," ex vi termini, implied

[52] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[53] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[54] See "Claim of Lien," §§ 399 et seq., post.

[55] **The drawings and plans, which were part of the contract,** represented the house as facing the longer way on A. Street, with a veranda the entire length of the A. Street front; one end of the house was shown to front on H. Street, and in the drawings of the H. Street front, standing in H. Street, facing the house, the veranda appeared to the left of the drawing, which established the house on the north side of A. Street, and the northwest corner of H. and A. streets; the drawings also showing where the house was located with reference to the streets, property lines, etc.: Blinn L. Co. v. Walker, 129 Cal. 62, 64, 65, 61 Pac. Rep. 664.

Where the memorandum filed erroneously described the adjoining lot, upon which certain improvements were also to be made, as running "easterly," but adjoining a lot described upon which a building was to be erected, and which was described in the contract as running "westerly," the error does not destroy the sufficiency of the memorandum, nor avoid the contract, being capable of correction by proper averment and proof: Dunlop v. Kennedy (Cal., Aug. 31, 1893), 34 Pac. Rep. 92, 96 (rehearing granted, and decision of commissioners reversed), **citing** Yancy v. Morton, 94 Cal. 558, 29 Pac. Rep. 1111.

[56] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[57] See, generally, §§ 286 et seq., ante.

that it need not contain a full and particular statement of the contract.[58]

§ 308. **Same. Statement of work. General principles.** It seems that if the description of the general character of the work is substantially complete, and is not fraudulently made, and the claimants are not misled or deceived because of any imperfection in it, and the owner acts in good faith, it is sufficient.[59]

The memorandum filed should show the dimensions and character of the work;[60] and the general material of which the building is to be constructed, whether of wood, brick, or stone, and the like;[61] and the size and shape of the house.[62]

The statement must not be too general, however; for instance, simply that "the building is to be a frame building."[63] To say that the building is to be a stone building, or a brick building, or a frame building, entirely fails, in

[58] Joost v. Sullivan, 111 Cal. 286, 294, 43 Pac. Rep. 896, in which it was said: "Webster defines it thus: '(Law.) A brief note in writing of some transaction, or an outline of some intended instrument; an instrument drawn up in brief and compendious form.' . . . The words 'general character' do not mean a special, particular, minute, or detailed description of the work to be done. The adjective 'general,' as defined in Webster's Dictionary, means: '1. Relating to a genus or kind; pertaining to a whole class or order; belonging to a whole rather than to a part; . . . 3. Not restrained or limited to a precise or detailed import; not specific; lax in signification'; and of the noun 'character' he gives, as applicable here, '9. Account; description.' The definition given of the word 'general,' in Black's Law Dictionary, so far as pertinent, is: 'Universal, not particularized; as opposed to special.' The same author defines the word 'character' only as applied to individuals, but it is nevertheless pertinent here: 'The aggregate of the moral qualities which belong to and distinguish an individual person; the general result of one's distinguishing attributes.'"

[59] Joost v. Sullivan, 111 Cal. 286, 296, 43 Pac. Rep. 896.

[60] Greig v. Riordan, 99 Cal. 316, 320, 33 Pac. Rep. 913.

[61] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 236, 29 Pac. Rep. 629; Greig v. Riordan, 99 Cal. 316, 320, 33 Pac. Rep. 913; Pierce v. Birkholm, 115 Cal. 657, 661, 47 Pac. Rep. 681; Butterworth v. Levy, 104 Cal. 506, 508, 38 Pac. Rep. 897. See Joost v. Sullivan, 111 Cal. 286, 295, 43 Pac. Rep. 896.

[62] Pierce v. Birkholm, 115 Cal. 657, 661, 47 Pac. Rep. 681. See Butterworth v. Levy, 104 Cal. 506, 508, 38 Pac. Rep. 897.

As to purpose for which building is intended, see Joost v. Sullivan, 111 Cal. 286, 295, 43 Pac. Rep. 896.

[63] Blythe v. Torre (Cal., Dec. 14, 1894), 38 Pac. 639. A rehearing was granted in this case, but it was dismissed by stipulation before final determination.

essentials, to give that notice to the public which the law contemplates. By consulting the memorandum, it would be impossible to say whether the building is to be a diminutive cottage or a large public caravansary, or whether the contract price is at all in proportion to the character of the building to be erected.[64]

§ 309. Same. Reference to plans and specifications. Where the memorandum is filed as such,[65] or where the contract is attempted to be filed, and, owing to its insufficiency as the proper filing of a contract, it is claimed to be sufficient as the filing of a memorandum,[66] and such memorandum of contract so filed contains a reference to the plans and specifications, and where they form an essential part of the contract, and where, without them, the contract would be indefinite and uncertain, such filing does not comply with the terms of section eleven hundred and eighty-three.[67]

[64] Blythe v. Torre, supra.

Where the memorandum gave the size of the lot, and it was sufficient in other respects, and set forth, "that a contract has been entered into for raising, making alterations, additions, and repairs to the two-story frame-house building to be used for tenements, situate, etc. [describing the lot]; . . . that the following is a statement of the general character of the work to be done under said contract, to wit, raising, making alterations, additions, and repairs to a two-story frame building to be used for two tenements, situated as above stated, and prosecuted under the direction of M. J. Welch, architect," — it is sufficient in this respect: Joost v. Sullivan, 111 Cal. 286, 295. 43 Pac. Rep. 896.

[65] Dunlop v. Kennedy, 102 Cal. 443, 445, 36 Pac. Rep. 765; Butterworth v. Levy, 104 Cal. 506, 508, 38 Pac. Rep. 897.

[66] See §§ 294 et seq., ante.

[67] Greig v. Riordan, 99 Cal. 316, 320, 33 Pac. Rep. 913.

See "Preliminary Statement," § 208, ante.

Contract providing that building is to be erected "in conformity with the plans, drawings, and specifications for the same, made by Huerne and Everett, the architects employed by the owner, and which are signed by the parties hereto, and are to be kept and remain in the office of said architects, subject to the inspection of the parties hereto, and others concerned in said erection," and containing the further provision, that "the specifications and drawings are intended to co-operate, so that any work exhibited in drawings, and not mentioned in specifications, or vice versa, is to be done as though mentioned in both," is insufficient; and the same cannot be treated, if filed, as containing a sufficient statement of the general character of the work to stand as a memorandum: Greig v. Riordan, 99 Cal. 316, 320, 33 Pac. Rep. 913.

Where, in addition to such statements, the contract filed provides that the contractor is to erect "a two-story dwelling-house and shed," the contract filed is insufficient as a memorandum: Pierce v. Birkholm, 115 Cal. 657, 661, 47 Pac. Rep. 681.

Where memorandum does not disclose that there were any plans or specifications, and it otherwise states the general character of the work, it is sufficient.[68]

The expression in a memorandum, "drawings hereto annexed," is to be construed as referring, not to the original contract, of which it is a memorandum, but to the memorandum itself; and where the drawings and specifications are referred to as signed by the parties, the memorandum will be construed to assert them to be parts of itself, and as stating nothing concerning the mode in which they were identified in the making of the written contract; and if a defect, it is one in the memorandum only, and the maxim, Falsa demonstratio non nocet, applies.[69]

When, in addition to such statements, the attempted contract provides that "the drawings and specifications are hereto annexed," instead of stating, as in the foregoing illustrations, that they "are in the office of the architect," and it also provides that the "building is to be three stories high," but does not set forth the materials of which the building is to be constructed, or any item from which its "general character" can be ascertained, the contract filed is insufficient as a memorandum: Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 236, 29 Pac. Rep. 629.

Where the memorandum states the general character of the work as a "one-story brick building, and all work mentioned in the specifications in connection therewith, in a workmanlike manner, and in conformity with the plans, drawings, and specifications for the same made by the construction committee of said company," etc., and the plans, drawings, and specifications are neither set out, nor filed in the recorder's office, and there is no other attempt to state either their contents or character in the memorandum, it is insufficient: Wood v. Oakland & B. R. T. Co., 107 Cal. 500, 503, 40 Pac. Rep. 806.

[68] Joost v. Sullivan, 111 Cal. 286, 294, 43 Pac. Rep. 896 (although the work, according to the memorandum, as shown above, was to be "prosecuted under the direction of M. J. Welch, architect." See Reed v. Norton, 90 Cal. 590, 601, 26 Pac. Rep. 767, 27 Id. 426, the record of which shows that the memorandum referred to the plans and specifications, and the general character of the work was "to build a two-story frame dwelling-house on said lot, resting upon a brick foundation and cellar, including all excavations and grading, all brick and masonry work, lathing and plastering, all carpenter and joiner work, doors, windows and glazing, all hardware, plumbing, gas-fitting, and trimming, all painting, and everything called for and in accordance with the plans and specifications prepared by H. S. Laird, architect." The court said that the memorandum did not specify that any plans or specifications should be filed, "nor is it necessary to a proper memorandum that they should be."

[69] Blinn L. Co. v. Walker, 129 Cal. 62, 66, 61 Pac. Rep. 664. The court say: "The case is not directly within Donnelly v. Adams, 115 Cal. 129, 46 Pac. Rep. 916, nor the case of West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533. These cases hold, substantially, that the contract is not wholly in writing, as required by the statute, unless

§ 310. **Same. Reference to detail drawings.** Enlarged detail drawings, prepared during the course of construction for the instruction of the workmen, which do not add to or change the contracts, specifications, or drawings on file, but merely show to the eye of the workmen how that which is called for in the contract is to be done, need not be filed with the memorandum, even if made a part of the same, nor filed at all, if made after the work was commenced. Reference to them in the contract is unnecessary, and works no change therein, and such a reference is not to the signed plans and drawings made part of the contract; but the phrase "detail drawings" is sufficiently ambiguous to allow an oral explanation of the architect to prove that it refers to such an amplification of the drawings constituting part of the contract. The architect, without such detail drawings, could stand over the workmen and give directions to the same end. Without such detail drawings, the original contract may be valid.[70]

§ 311. **Same. Payments.** The mechanic's-lien law [71] requires that the memorandum of the contract shall contain a statement of "the total amount [72] to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable." [73]

The analogies suggested by defective statements of the statutory requirements as to statutory original contracts with reference to payments may be profitably considered in this connection, in the light of the object to be accomplished.[74]

the plans and specifications referred to are identified in writing as part of the contract. The memorandum here asserts nothing as to the mode in which this was done in the making of the contract. If a defect, it is one in the memorandum only. . . . The specifications are otherwise sufficiently identified; they are attached to the memorandum as a part thereof."

[70] Blinn L. Co. v. Walker, 129 Cal. 62, 67, 61 Pac. Rep. 664 (concurring opinion).

[71] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[72] Snell v. Bradbury, 139 Cal. 379, 381, 382, 73 Pac. Rep. 150.

[73] See Neihaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255, 256 (no point, however, seems to have been made on these matters).

[74] See §§ 272 et seq., ante, and, generally, §§ 286 et seq., ante; also **Kerr's Cyc. Code Civ. Proc.,** § 1184, and note.

§ 312. **Time of filing contract or memorandum.** The statutory original contract, or a proper memorandum thereof, must be filed before the commencement of the work; otherwise the contract is void.[75]

The general rule, heretofore stated,[76] as to requirements not essential to the validity of the statutory original contract, seems applicable; namely, that a substantial compliance with this provision is all that is necessary, provided no one is injured thereby, and there is no evidence of bad faith.[77]

§ 313. **Place of filing contract or memorandum.** The statute [78] regulating the place of filing provides that the contract or the memorandum "shall . . . be filed in the office of the county recorder of the county, or city and county, where the property is situated." No express provision seems to have been made where the property is situated in two counties. On the other hand, the requirement of the statute [79] in reference to the filing of the owner's notice of completion of the building and the claimant's claim of lien is, that the same must be filed with or in the office of the recorder of the county, or city and county, in which such property, or some part thereof, is situated.[80]

§ 314. **Conspiracy as to contract price.** Under the statute,[81] "if the owner and his contractor shall directly or in-

[75] **Kerr's Cyc. Code Civ. Proc.,** § 1183, and note. See Willamette S. M. Co. v. Kremer, 94 Cal. 205, 207, 29 Pac. Rep. 633.

As to materials furnished before filing contract, see Giant Powder Co. v. San Diego F. Co., 97 Cal. 263, 32 Pac. Rep. 172.

See "Filing Contract," § 294, and see, generally, §§ 286 et seq., ante.

Colorado. Laws 1893, § 1, p. 315, seems to allow the filing after the commencement of the work, but work done or material furnished prior thereto "are deemed to have been done at the personal instance of the owner."

[76] §§ 270 et seq., ante.

[77] Thus where the memorandum of contract was filed on a certain day, at 10:30 a. m., and the work, if any at all, commenced before the filing was of the most trifling nature, and was not commenced, at the earliest, until 8 or 8:30 a. m. of the same day, it is a sufficient filing before the work was commenced: Reed v. Norton, 90 Cal. 590, 600, 26 Pac. Rep. 767, 27 Id. 426.

[78] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[79] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[80] See, generally, "Filing Claim," § 416, post.

[81] **Kerr's Cyc. Code Civ. Proc.,** § 1202, as amended March 18, 1885.

directly conspire to or agree that the written contract filed shall appear to show the contract price to be less than it really is, and it shall accordingly so show, then such contract shall be wholly void, and no recovery shall be had thereon by either party thereto, and in such case the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." [82]

Penalties for conspiracy. It is to be observed that the conspiracy mentioned in the foregoing provision is attended with the same penalties as a failure to comply with the provisions of section eleven hundred and eighty-three,[83] as to statutory original contract. It is evident that this provision applies only to the statutory original contract;[84] and the same rules of construction to avoid penalties, it seems, would be equally applicable, as in the case of other similar penalties set forth in the statute.[85]

[82] See Reed v. Norton, 99 Cal. 617, 618, 34 Pac. Rep. 333; California I. Const. Co. v. Bradbury, 138 Cal. 328, 334, 71 Pac. Rep. 346, 617, and dissenting opinion of Beatty, C. J.

[83] **Kerr's Cyc. Code Civ. Proc.,** § 1183, and note.

[84] See "Definition of Statutory Original Contract," §§ 214, 259, ante. And see Sidlinger v. Kerkow, 82 Cal. 42, 46, 22 Pac. Rep. 932.

[85] See "Construction," § 26, ante.

CHAPTER XVII.

BUILDING CONTRACTS (CONTINUED).

C. Effect of Validity or Invalidity of Statutory Original Contract.

§ 315. Effect of validity of contract. Owner's liability.
§ 316. Same. Valid contract as notice.
§ 317. Same. Abandonment of contract.
§ 318. Same. How far subclaimants are bound by other terms of valid original contract.
§ 319. Effect of invalidity of statutory original contract. Generally.
§ 320. Same. Classes affected by invalidity of contract.
§ 321. Same. Effect as between parties to the contract.
§ 322. Same. Contractor's lien on express or implied contract.
§ 323. Same. To what extent contract may be looked to by the parties.
§ 324. Same. Lien claimants, other than original contractor.
§ 325. Same. How far effective.

C. EFFECT OF VALIDITY OR INVALIDITY OF STATUTORY ORIGINAL CONTRACT.

§ 315. Effect of validity of contract. Owner's liability.[1] Where there is a valid contract between the owner and the contractor, such contract is the absolute measure of the owner's liability;[2] and where there is such a valid contract,

[1] **Lien as limited by contract:** See §§ 14, 33, 71, 288, ante; "Liability of Owner," §§ 523 et seq., post.

[2] Hampton v. Christensen, 148 Cal. 729, 735, 84 Pac. Rep. 200; Stimson M. Co. v. Braun, 136 Cal. 122, 124, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726; McDonald v. Hayes, 132 Cal. 490, 64 Pac. Rep. 850; Kellogg v. Howes, 81 Cal. 170, 175, 22 Pac. Rep. 509.

Owner's liability under contract. "When an owner of property has contracted with another to erect a building or other superstructure, or do any other work, or furnish materials therefor, all subcontractors and parties agreeing to furnish labor or materials to such original contractor do so with reference to such original contract, in subordination to its provisions and to the rights of the respective parties thereto, so far as they relate to the liability of the owner or the property, or so far as they rely on such liability; and any agreement such parties may make with such original contractor is, so far as relates to the owner or the property, subject to all the terms, agreements, conditions, and stipulations of such original contract; and the owner or the property cannot be held liable or bound to any extent beyond the terms of the original contract, or such new or further contract as he may make with the original contractor or the subcontractors. Any other rule would place the owner and his property

under which the work is done, and which is performed by the owner, all that the statute assumes to do, and in fact all that can be done, is to enable the subclaimants to cause the contract price to be applied to the payment of their demands. All that has been held upon this point is, that it is not an unreasonable interference with the right of the owner; that whatever contract he makes shall be so executed and published that the constitutional policy may be carried out.[3]

Limitation on power of legislature. The legislature cannot give a right to a lien to an extent greater than the contractual price, under a valid contract, and the lien is limited by the terms of such contract.[4]

§ 316. **Same. Valid contract as notice.** Knowledge that there is a contract between the owner and the contractor, where the claimant is a subcontractor under the contractor, is sufficient to put the claimant upon inquiry, and he is to be considered as affected by notice of the contents and stipulations of the contract when it is valid.[5] And of the existence of the valid original contract, and its terms, subordinate lien claimants are presumed to have knowledge, and to have taken subcontracts and furnished labor and materials in subordination thereto.[6]

completely at the mercy of the contractor; would give the contractor the power, without any authority whatever, to make contracts binding the owner and his property. There is nothing in the relation of the parties which can, by any rule of law, vest in the contractor any such power": Bowen v. Aubrey, 22 Cal. 566, 571 (1858).

[3] Gibbs v. Tally, 133 Cal. 373, 377, 65 Pac. Rep. 970, 60 L. R. A. 815.

[4] Stimson M. Co. v. Braun, 136 Cal. 122, 125, 126, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726. It must be admitted that the reasoning of this case, carried to the logical conclusion, could enable a contractor and owner to enter into a contract which would prevent any mechanic's lien from being enforced against the property. The quotation of the court from Gibbs v. Tally, 133 Cal. 373, 65 Pac. Rep. 970, 60 L. R. A. 815, does not go to the extent apparently claimed for it in the opinion. The former case goes very close to the doctrine that although the legislature may require the filing of a statutory original contract as a condition of its validity, yet it cannot interfere with any provision of the contract, which may contain such terms as the parties may see fit to agree to. The development of the rule laid laid down in this case may therefore be watched with interest.

[5] Bowen v. Aubrey, 22 Cal. 566, 571 (1858).

[6] Shaver v. Murdock, 36 Cal. 293, 298 (1862); Henley v. Wadsworth, 38 Cal. 356, 361 (1862); Dingley v. Greene, 54 Cal. 333, 337; Kellogg v. Howes, 81 Cal. 170, 175, 6 L. R. A. 588, 11 Pac. Coast L. J. 589; Walsh v. McMenomy, 74 Cal. 356, 359, 16 Pac. Rep. 17. See Wilson v. Barnard, 67 Cal. 422, 423, 7 Pac. Rep. 845.

Subclaimants, in the absence of fraud or misrepresentation by the owner, are conclusively presumed to have knowledge of the provisions of such original contract, and its terms are binding upon them, with reference to any demand against the owner or his property.[7]

§ 317. Same. Abandonment of contract. The statute[8] provides a mode in which the owner may limit his liability; viz., by causing the statutory original contract to be filed in the recorder's office; but it is only "in the case of a contract for the work" duly filed that the amount of the lien is limited by the contract price, where the contract price exceeds one thousand dollars, and such limitation remains even though the contractor "shall fail to perform his contract in full, or shall abandon the same before completion."[9] And if the statutory original contract is valid, the owner cannot be held liable beyond the contract price, whether the contract is performed or abandoned.[10]

§ 318. Same. How far subclaimants are bound by other terms of valid original contract. It must be admitted, at the outset, that the California authorities are neither clear, logical, nor consistent upon this point. So far as the mere extent of liability is concerned, there is no faltering decision that, under a valid contract, the price agreed is the limit of the owner's responsibility and the boundary which marks the claim against his land. The cases, for the most part, have arisen upon completion of the contract, upon abandonment of the same, or malperformance of the terms thereof, or for

Colorado. Jensen v. Brown, 2 Colo. 694, 696; Davis v. Mouat L. Co., 2 Colo. App. 381, 31 Pac. Rep. 187; Ditto v. Jackson, 3 Colo. App. 281, 33 Pac. Rep. 81 (1889).

[7] Henley v. Wadsworth, 38 Cal. 356, 361 (1862). See Downing v. Graves, 55 Cal. 544, 548.

See "Void Contract," §§ 319 et seq., post; "Liability of Owner," §§ 523 et seq., post; "Rights of Subcontractors," § 71, ante

[8] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[9] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629.

[10] McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850; Greig v. Riordan, 99 Cal. 316, 319, 33 Pac. Rep. 913; Johnson v. La Grave, 102 Cal. 324, 325, 36 Pac. Rep. 651; Stimson v. Dunham Co., 146 Cal. 281, 79 Pac. Rep. 968.

delay in its performance, upon which the owner may recoup the damages for failure properly to perform the contract, except as against the final payment of twenty-five per cent. But there are many other provisions of a valid contract besides the mere payment of the contract price, or so much thereof as would be due to the contractor from the owner, after deducting such counterclaims.

Lumber and workmanship below contract requirements. Where, for instance, the contractor obligates himself to construct with first-class lumber, and he uses second-class lumber, in what sense is a subclaimant bound by the provision in the original contract requiring the use of first-class lumber only? Is the material-man to lose his lien because he has knowledge that the original statutory contract on file, of which he is bound to take notice, declares that only first-class lumber is to be used in the structure, and second-class lumber is furnished by him to the contractor for the building, upon the latter's order? And likewise as to the work performed by subcontractors under such original contract. It has been held that the work of the subcontractor must comply with the terms of such original contract,[11] and, more recently,[12] that the material-man and subcontractor, under such circumstances, in the absence of conspiracy or fraud, have liens upon the property, and this, in our view, is the better doctrine; for the same rule would otherwise apply

[11] Downing v. Graves, 55 Cal. 544, 549.

Subcontractor bound by contract of person through whom he claims, and his right to lien is measured by contractor's right under the contract: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008. See Van Clief v. Van Vechten, 130 N. Y. 571.

As to materials and liens being such as contract calls for to entitle material-man or subcontractor to a lien, see Tabor v. Armstrong, 9 Colo. 285, 12 Pac. Rep. 157; also 20 Am. & Eng. Encyc. of L., 2d ed., pp. 362, 369.

[12] See §§ 71, 103, ante.

Materials must be suitable for the purpose for which furnished, or there will be no right to a lien: Boynton F. Co. v. Gilbert, 87 Iowa 15, 53 N. W. Rep. 1085; Harlan v. Rand, 27 Pa. St. (3 Casey) 511.

Materials not of quality required to be used in particular building, but of such a character as might ordinarily be used in such buildings, there is a right on part of material-man to a lien: Odd Fellows' Hall v. Masser, 24 Pa. St. (12 Harris) 507, 64 Am. Dec. 675.

Lien for inferior materials, where used in the improvement: Odd Fellows' Hall v. Masser, supra; Wisconsin R. P. B. Co. v. Hood, 67 Minn. 329, 69 N. W. Rep. 1091, 64 Am. St. Rep. 418.

to all subclaimants, and would require the mere laborer of the contractor constantly to inspect the plans and specifications and the provisions of the contract at each step of his work, and would lead to a reductio ad absurdum, and cause the statute to become a snare, if not an absolute impediment to all work of construction.

Owner's redress for failure to comply with terms. But, yet, the owner should in some way be protected against the noncompliance with the terms of such contract, and he is so protected; for the fund to which such liens attach may be great or small, in accordance with the counterclaims which the owner may assert, owing to the non-performance or malperformance of the original contract. If the contractor should not recover on the contract because he failed to perform to an extent justifying the court in refusing any judgment for any amount in favor of the contractor, no doubt his subclaimants, in case the original contract were valid, would be bound by such failure to perform; and if the contractor can recover nothing, and subclaimants under such valid contract should find the fund evaporated, and while their liens might be valid, as such, there would be nothing to which they could attach. So far, perhaps, the authorities go, except, it may be, the recent case which holds that the final payment of twenty-five per cent, required by the statute in cases of statutory original contracts, is not subject to deductions for malperformance, if not for non-performance.[13]

[13] **The decision in Hampton v. Christensen,** 148 Cal. 729, 735, 84 Pac. Rep. 200, does not fully coincide with the doctrine of the text; for it holds that, as to the final payment of twenty-five per cent, the owner cannot counterclaim his right to damages for omissions or failure to carry out the statutory original contract (and the rule laid down can apply to such contract only), or for damages for delay, until subclaimants have their liens first satisfied. This is based upon the alleged policy of the constitution that such claimants shall have a lien; but it may be answered: 1. That the constitution does not provide for the liens of all claimants under the protection of the statute: See § 28, ante; 2. That it has also been held that this provision of the constitution is subordinate to other provisions of the same instrument guaranteeing the right to possess and enjoy property, etc.: See §§ 32 et seq., ante; 3. That it is contrary to Reed v. Norton, 90 Cal. 590, 593, 602, 26 Pac. Rep. 767, 27 Id. 426. See "Abandonment," §§ 358 et seq., post. The mere fact that the owner can, as contended in the Hampton case, make the payment upon completion of the structure sufficiently large to enable him to protect himself against malfeasance or nonfeasance of the contractor in carrying out his contract, it is sub-

If the valid contract is not entirely broken by the nonfeasance or malfeasance of the contractor, but such omissions or breaches of contract can be compensated to the owner in damages,[14] there may be some fund to the extent of which the subclaimants may go upon the property as security for their demands.

mitted, is no answer; for, in the first place, such payment may not possibly be made large enough, outside of the final payment of twenty-five per cent, and in the next place, it would require the owner to make certain definite provisions in his contract, which would be as much an interference with his right to contract as the provision of § 1184 of the Code of Civil Procedure, requiring him to make payment only in money, which was held unconstitutional: Stimson M. Co. v. Braun, 136 Cal. 122, 125, 126, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

Decisions unsatisfactory. The decisions in these matters are far from being in a satisfactory condition. If the effect of the constitutional provision (§ 15, art. xx, **Henning's General Laws**, p. civ), as to "mechanics, material-men, artisans, and laborers of every class," is to give a lien to such persons, why should they not have a lien for the full value of their materials or labor? The constitution expressly says so. Here again arises the question as to whether a direct or indirect lien is given: See §§ 10 et seq., ante. Under the constitution, it seems that no indirect lien is provided for, although it has not been so expressly decided.

It may well be questioned whether the provision as to final payment, as contended in the Hampton case (148 Cal. 729, 735, 84 Pac. Rep. 200), is a law enacted by the legislature in obedience to the constitutional mandate that it "shall provide by law for the speedy and efficient enforcement of such liens"; for the provision, it seems, can in no sense be said to be a law relative to the enforcement of the lien, which would relate rather to matters of procedure; but, on the contrary, it is a provision predetermining what the original contract in certain cases shall contain.

As far as the material-man is concerned, upon abandonment the material on the ground belongs to the owner, under § 1200 of the Code of Civil Procedure. That is one way by which the statute attempts to present value to the owner, for which, upon the general theory of such liens, the material-man should have a lien. The title to such material, of course, would ordinarily be in the contractor. If the laborer performs work upon the structure, the value has gone into the owner's building, and upon the same theory the laborer should have a lien. But if, notwithstanding the furnishing of this material or the performance of this work, the contractor absolutely fails to perform his contract as to the manner and mode of construction, as, for instance, to take a case not probable in practice, but possible in conjecture, the contractor should build a bathhouse when he should construct a large hotel, how are the rights of the various parties to be adjusted? Is the owner to pay the laborers from the final twenty-five per cent? The contractor would be entitled to nothing. The owner has something he does not want, possibly a great damage to his land — a thing which he may have to destroy at his own loss and expense. It could hardly be urged, under such circumstances, that the material-man or laborer had conferred value upon the owner.

[14] See "Performance," §§ 334 et seq., post.

Substantial compliance with contract. While not entirely in accord with the decisions, it is submitted that this statement of the law reconciles apparently conflicting decisions, makes the statute plain and comprehensive, and adequately renders justice to all concerned. The subclaimant is, to the full extent, bound by the valid contract, as to the terms of which he is presumed to have knowledge, and all the rights of the owner are preserved, without rendering the statute either a burden or an absurdity. The subclaimant, on the other hand, does not lose his lien, in the absence of fraud or conspiracy, by failure to furnish materials or perform work in accordance with the terms of the valid original contract, although by so doing, with or without actual knowledge of the terms of the contract on file, as to which he may inform himself, he takes the risk of having his lien drained of all value by consciously or unconsciously aiding the contractor in his breach of the original contract.

§ 319. Effect of invalidity of statutory original contract. Generally.[15] The failure to file a legal statutory original contract, or a sufficient memorandum thereof, within the proper time, as required by the statute,[16] renders the contract, according to the language of section eleven hundred and eighty-three,[17] wholly void.[18] The same result, according to the terms of the statute, flows from a conspiracy embodied in the statutory original contract to make the contract price less than it really is.[19]

[15] **Abandonment of void contract, rights of subclaimants in fund:** See Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262; Berentz v. Belmont O. M. Co., 148 Cal. 577, 584, 84 Pac. Rep. 47, 113 Am. St. Rep. 308.

See "Abandonment," §§ 358 et seq., post.

[16] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[17] Id.

[18] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1202, and notes. See San Diego L. Co. v. Wooldredge, 90 Cal. 574, 578, 27 Pac. Rep. 431; Willamette S. M. Co. v. Kremer, 94 Cal. 205, 207, 29 Pac. Rep. 633; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 233, 29 Pac. Rep. 629; Giant Powder Co. v. San Diego F. Co., 75 Cal. 193, 197, 20 Pac. Rep. 419, s. c. 97 Cal. 263, 264, 32 Pac. Rep. 172; Barker v. Doherty, 97 Cal. 10, 31 Pac. Rep. 1117; Booth v. Pendola, 88 Cal. 36, 41, 25 Pac. Rep. 1101, 24 Pac. Rep. 714; Schallert-Ganahl L. Co. v. Neal, 90 Cal. 213, 214, 27 Pac. Rep. 743; Smith v. Bradbury, 148 Cal. 41, 82 Pac. Rep. 367, 113 Am. St. Rep. 189.

[19] **Kerr's Cyc. Code Civ. Proc.,** § 1202.

§ 320. Same. Classes affected by invalidity of contract. Three classes of persons are affected by the invalidity of the statutory original contract: 1. The owner; 2. The original contractor; and 3. Material-men, subcontractors, artisans, laborers, and other persons given liens under the statute.[20] It was formerly held that when such a contract is "wholly void," it is void as to everybody whose rights would be affected by it if valid,[21] and that there is neither an "original contract" nor an "original contractor."[22] These rules have been modified with reference to the first and second classes above mentioned, as will be hereafter more fully discussed.[23]

§ 321. Same. Effect as between parties to the contract. As between the parties to such a void statutory original contract, while it was formerly held that it was void for every purpose, as if no contract had been made,[24] this doctrine has been considerably modified.

The evident intent of the statute was to make it an object for both the contractor and owner to put in writing and record their building contract, where the amount agreed to be paid is in excess of one thousand dollars. The penalty which attaches to the owner for failure to do so is, that he may be held liable for the value of all labor done and materials furnished by all persons other than the contractor, without reference to the contract price.[25] The contractor suffers the penalty, on a like failure, of being excepted from the class of persons who may take liens under the law.[26]

[20] Laidlaw v. Marye, 133 Cal. 170, 172, 62 Pac. Rep. 391.

[21] Kellogg v. Howes, 81 Cal. 170, 178, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589, **explaining** Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 20 Pac. Rep. 419 (as to the "contract remaining to mark the extent of the recovery of lien-holders," etc.).

[22] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 395, 30 Pac. Rep. 564.

See "Original Contractor," § 52, ante.

[23] See §§ 321 et seq., post.

[24] Kellogg v. Howes, 81 Cal. 170, 178, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 236, 29 Pac. Rep. 629; Davis v. MacDonough, 109 Cal. 547, 549, 42 Pac. Rep. 450.

But see "Evidence," §§ 807, 808, post.

[25] Morris v. Wilson, 97 Cal. 644, 645, 32 Pac. Rep. 801; Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262.

[26] Morris v. Wilson, 97 Cal. 644, 645, 32 Pac. Rep. 801; McClain v. Hutton, 131 Cal. 132, 142, 61 Pac. Rep. 273, s. c. 63 Pac. Rep. 182, 622.

Void contract cannot be basis of recovery by the contractor against the owner; nor can it be looked to for the purpose of determining when any payment is to be made.[27] Neither can it be the basis of a recovery by the contractor against the owner for damages thereunder, as for not being allowed to complete the building;[28] nor by the owner against the contractor, as for not completing the building in time;[29] nor as a foundation of the right to complete the building according to its terms.[30]

§ 322. **Same. Contractor's lien on express or implied contract.** The failure to file such contract or memorandum, as before stated, deprives the contractor of his lien, and also of his remedies on the express contract, but he does not, by such means, acquire any greater right to a recovery for his labor and materials than he would have had if he had brought the action irrespective of his right to a lien.[31] Nor can the contractor, under such circumstances, file a claim of lien upon the implied contract for the demand upon which a recovery could be had on the original contract if valid.[32]

§ 323. **Same. To what extent contract may be looked to by the parties.** The statutory original contract, although void, may be looked to for the purpose of determining what should be treated as a part of the building.[33] It constitutes the measure and test of recovery by the contractor upon the implied contract,[34] and though it cannot be the basis of

[27] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 236, 29 Pac. Rep. 629; Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 395, 30 Pac. Rep. 564.

[28] Palmer v. White, 70 Cal. 220, 221, 11 Pac. Rep. 647.

[29] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 396, 30 Pac. Rep. 564; Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412.

[30] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 240, 29 Pac. Rep. 629; Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 396, 30 Pac. Rep. 564.

[31] Marchant v. Hayes, 117 Cal. 669, 671, 49 Pac. Rep. 840.

[32] Morris v. Wilson, 97 Cal. 644, 646, 32 Pac. Rep. 801.

[33] Macomber v. Bigelow, 126 Cal. 9, 12, 58 Pac. Rep. 312.

[34] Camp v. Behlow, 2 Cal. App. 699, 701, 84 Pac. Rep. 251. The language of this decision, that the "contract is not void between the parties," and the fact that the contract was not filed is immaterial, where no lien is involved, seems to show a misconception of the decision in Laidlaw v. Marye, 133 Cal. 170, 173, 65 Pac. Rep. 391. If

a recovery by the contractor, upon implied assumpsit, without attempting to enforce a lien, the measure of his recovery must, in any event, be limited by the contract price, and he must show a substantial compliance with its terms to warrant any such recovery at all.[35]

the contract were not void between the parties, a recovery could be had upon the express contract. All that the Laidlaw case holds is, that the void contract may be looked to as evidence to determine the outside limit of the owner's liability on the implied contract, and whether a benefit has been conferred at the request of the owner as evidenced by such void contract, upon which to base an action on the implied contract, under the general principles of law; in other words, the void contract survives, not as a contract, but merely as evidence of another contract for certain purposes, between the parties.

[35] Laidlaw v. Marye, 133 Cal. 170, 176, 65 Pac. Rep. 391, in which it is said: "We think further, that the error arose in Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 30 Pac. Rep. 564, by misapplication to original contractors of language directed solely to the case of subcontractors, material-men, artisans, and laborers. Heretofore, as will subsequently be pointed out, the court, by the logic of necessity, if from no other consideration, has felt compelled to modify the force of the Rebman decision, but it is certainly preferable that it should at once be overruled, if it be untenable, rather than that it should be undermined and eaten away after a long course of vexatious and expensive litigation, filling the books with discriminated cases, all receding further and further from, and growing more and more dissimilar to, the parent case. When the statute declares that the contract shall be wholly void, it means, as Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 230, 29 Pac. Rep. 629, decided, that it is wholly void as to the third class above designated, who there upon become entitled to liens for the full value of their material and service, and are deemed to have furnished them to the owner at his special request. By thus allowing full compensation to this class, the owner is sufficiently punished for any remissness on his part, while, with like measure, the original contractor is penalized by losing his lien. But the law never meant to reward the contractor for his disobedience, by conferring upon him, for its violation, greater rights than would have been his had he obeyed it. Therefore, as between him and the owner, the contract must remain, not the basis of his recovery, but the measure and test of his right to recover. He must still show a substantial compliance with its terms, to warrant any recovery at all, and the measure of his recovery, even under implied assumpsit, must be limited, as to him, by the contract price. Thus only is the law given a just and harmonious operation. In Barker v. Doherty, 97 Cal. 10, 31 Pac. Rep. 1117, the cases of Kellogg v. Howes, 81 Cal. 170, 22 Pac. Rep. 509, and Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 230, 29 Pac. Rep. 629, were the subject of review, and it is said: 'Those cases decided that the contract was void as forming the basis of a recovery, and no legal liability could be created by any of its provisions. This would seem to be apparent from a cursory reading of the provision itself. It was never intended to hold, in those cases, that the writing could not be used as evidence to determine the character of the building to be erected, and thereby to furnish the test by which it could be known when the building was completed. Such is evident from the fact that in those cases the test

§ 324. **Same. Lien claimants, other than original contractor.** Sections eleven hundred and eighty-three and twelve hundred and two [36] provide that when the statutory original contract is void "the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." This simply preserves the right of claimants under the original contractor to a lien when the original contract is void for the statutory reasons,[37] but does not give a right of personal judgment against the owner, when no privity exists, and then the lien of subclaimants is not limited by the amount due the contractor from the owner.[38]

Where there is no contractual relation between the owner and the claimant, the statute, in order to effectuate the lien in the contingencies mentioned, in deeming that the labor is performed or the material is furnished at the personal instance of the owner, does so simply for the purpose of the liens, and the statute creates, by its own force and vigor, such a relation for a specific purpose, namely, to uphold the liens. In such case, the statute does not, however, create, or attempt to create, a contractual relation or privity between the owner and the claimants upon which a personal action will lie.[39] This liability of the owner for the amount of liens above the contract price is a statutory liability, and not by

of completion of the buildings was furnished by an inspection of the very contracts which were held to be "wholly void." Any other interpretation of this provision of the statute would lead to inextricable confusion, and practically nullify the entire section.'" And see Sullivan v. California R. Co., 142 Cal. 201, 203, 204, 75 Pac. Rep. 767; Camp v. Behlow, 2 Cal. App. 699, 84 Pac. Rep. 251, holding that Kuhlman v. Burns, 117 Cal. 469, 49 Pac. Rep. 585, is no longer the law, as it was overruled by Laidlaw v. Marye, 133 Cal. 170, 65 Pac. Rep. 391.

See also note 34, this section.

[36] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1202.

[37] Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 627, 16 Pac. Rep. 516; McMenomy v. White, 115 Cal. 339, 47 Pac. Rep. 109; First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45; Madera F. & T. Co. v. Kendall, 120 Cal. 182, 184, 52 Pac. Rep. 304, 65 Am. St. Rep. 177.

[38] San Francisco L. Co. v. O'Neil, 120 Cal. 455, 456, 52 Pac. Rep. 728.

[39] Gnekow v. Confer (Cal., March 31, 1897), 48 Pac. Rep. 331. See Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589; San Francisco L. Co. v. O'Neil, 120 Cal. 455, 456, 52 Pac. Rep. 728.

virtue of the contract with the contractor.[40] And where the contract is void, the statute, and not the contract, measures the extent of the recovery on liens, and there is no contract of which the subcontractor is bound to take notice, and his knowledge that a contract was attempted to be made, but was not, cannot affect his rights.[41] And in any action against the owner by subclaimants, their rights are to be determined by other rules, and irrespective of any provision of such contract.[42] There being no contract, it would follow, even though the statute had not said so, that the owner himself is building the structure, and in that case the so-called contractor is (as to other lienors) but the statutory agent of the owner.[43]

By the failure to file such contract, subclaimants have no means of knowing whether the contract is in writing or not, or whether it is for more or less than one thousand dollars.[44] They have no notice of payments to be made, or when they will fall due, or at what time they are required to give the owner notice. As a penalty for not affording them this means of knowledge by filing such contract as is required by the statute, the owner is deemed to have contracted for the material, so far as the right of lien is concerned, and his property is bound for the value of such material.[45]

Lien claimants must follow statute. But the subclaimants, if they desire to enforce the lien upon the property, must follow those provisions of the statute which are prescribed for preserving the lien when the claimant has in fact performed his labor or furnished his materials at the personal instance of the owner;[46] and a lien can be had for labor or

[40] Boas v. Maloney, 138 Cal. 105, 107, 70 Pac. Rep. 1004.

[41] Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589.

[42] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 236, 29 Pac. Rep. 629.

[43] Gibbs v. Tally, 133 Cal. 373, 377, 65 Pac. Rep. 970, 60 L. R. A. 815.

[44] Berentz v. Belmont O. M. Co., 148 Cal. 577, 584, 84 Pac. Rep. 47, 113 Am. St. Rep. 308.

[45] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 645, 22 Pac. Rep. 860.

[46] Davis v. MacDonough, 109 Cal. 547, 549, 42 Pac. Rep. 450; Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 627, 16 Pac. Rep. 516.

materials furnished before the filing of a void statutory original contract.[47]

§ 325. **Same. How far effective.** While it has been said that a void statutory original contract is absolutely void as against lien claimants other than the contractor,[48] yet the contract may be looked to by claimants other than the contractor to determine the character of the building to be erected, and thereby to furnish a test by which it can be known when the building is completed.[49] And although the contract may be void, a bond guaranteeing performance of all the conditions of the contract, and that the house to be constructed by the contractor should be delivered free from all liens that might arise from and be filed against the building on account of material or labor furnished to the contractor and used in or about the structure, is valid, and binding upon the sureties.[50]

The material-man is not estopped from claiming that the contract is void from the fact that he has contracted to furnish the lumber and made out bills with express reference to the plans and specifications.[51]

Deduction from the authorities may fairly be made, that, notwithstanding the formal statements that the void statutory original contract is entirely void as to all claimants other than the original contractor, it may still be looked to for the purpose of working out some necessary benefit for those whom the statute intended to favor, and not to penalize.

[47] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Giant Powder Co. v. San Diego F. Co., 97 Cal. 263, 264, 32 Pac. Rep. 172.

[48] Laidlaw v. Marye, 133 Cal. 170, 176, 65 Pac. Rep. 391.

[49] Baker v. Doherty, 97 Cal. 10, 12, 31 Pac. Rep. 1117; Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896.

See "Void Contract as Evidence," §§ 807, 808, post.

[50] **Void contract, effect on sureties:** Blyth v. Robinson, 104 Cal. 239, 241, 37 Pac. Rep. 904; Kiessig v. Allspaugh, 91 Cal. 234, 237, 27 Pac. Rep. 662, 13 L. R. A. 418, s. c. 99 Cal. 452, 454, 34 Pac. Rep. 106; McMenomy v. White, 115 Cal. 339, 344, 47 Pac. Rep. 109; Summerton v. Hanson, 117 Cal. 252, 49 Pac. Rep. 135.

See "Sureties," §§ 605 et seq., post.

[51] West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533, 534, in which the court say, however: "They probably did not then know that the contract was void. They have not misled defendant, nor induced him to change his position, and it does not appear that they have suppressed knowledge of the invalidity while dealing with the contractor."

CHAPTER XVIII.

BUILDING CONTRACTS (CONTINUED). EXTINCTION OF CONTRACT.

§ 326. Alteration of original contract. Statutory provisions.
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§ 357. Same. As affected by validity or invalidity of original contract.
§ 358. Abandonment of original contract.
§ 359. Same. Owner's liability.
§ 360. Same. Justification for abandonment.

§ 326. **Alteration of original contract.**[1] **Statutory provisions.** The Code of Civil Procedure [2] provides, among other things: "No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the reputed owner in any amount for damages or otherwise, for non-performance of his contract or otherwise. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner and against the contractor; no alteration of any such contract shall affect any lien acquired under the provisions of this chapter. In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof."

[1] **Modification of contract:** See Boothe v. Squaw Springs W. Co., 142 Cal. 573, 577, 76 Pac. Rep. 385; Gilliam v. Brown, 116 Cal. 454, 48 Pac. Rep. 486.

Modification of contract for street-work: See Flinn v. Mowry, 131 Cal. 481, 485, 63 Pac. Rep. 724, 1006.

Modification of contract to construct tunnel: See Sullivan v. Grass Valley F. M. & M. Co., 77 Cal. 418, 422, 19 Pac. Rep. 757.

Premature payment: See Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. Rep. 512.

Hawaii. See Pacific H. Co. v. Lincoln, 12 Hawn. 358, 359.

Oregon. Modification of original contract, whereby owner purchased materials: See Cline v. Shell, 43 Oreg. 372, 73 Pac. Rep. 12.

Alterations in contract affecting sureties: See Enterprise Hotel Co. v. Book (Oreg.), 85 Pac. Rep. 333, 336.

Washington. Provision in contract as to modifications: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25, 29.

Interlineation altering contract not avoiding same: See Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 421.

Alterations of contract affecting sureties: See De Mattos v. Jordan, 15 Wash. 378, 46 Pac. Rep. 402.

[2] **Kerr's Cyc. Code Civ. Proc.,** § 1184, in effect March 15, 1887.

Another section [3] of the same code provides: "It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void."

§ 327. Same. To what original contracts provisions applicable. All of the provisions set forth in the foregoing section undoubtedly apply to statutory original contracts; and the extent of their application to non-statutory original contracts has been elsewhere considered.[4] The provisions as to contracts apply only to "original contracts." [5]

The expression "any such contract," used in the first part of section eleven hundred and eighty-four, above quoted, relating to payments, and the expression "such contracts," in the last sentence in the above quotation, have been held to relate only to statutory original contracts.[6]

§ 328. Same. Statutory original contract. While there are points at which questions will arise,[7] it has been said that

[3] **Kerr's Cyc. Code Civ. Proc., § 1201.**

[4] See §§ 258 et seq., ante. In Anderson v. Johnston, 120 Cal. 657, 659, 53 Pac. Rep. 264, the question arose between the contractor and the owner, and an executed oral agreement changing the terms of a written non-statutory original contract was allowed. Some of the provisions do not seem to be applicable to non-statutory original contracts: Denison v. Burrell, 119 Cal. 180, 183, 51 Pac. Rep. 1.

See §§ 258 et seq., ante.

[5] See § 211, ante.

[6] Sidlinger v. Kerkow, 82 Cal. 42, 44, 22 Pac. Rep. 932. See §§ 269 et seq., ante, and "Payments," §§ 272 et seq., ante.

[7] See "Impairment of Liens," § 284, ante.

Before the enactment of §§ 1184 and 1201, Code of Civil Procedure, in present form, where the contract provided "in case any additions, omissions, or alterations of the plans may be required by the owner during the progress of the work, they shall be acceded to by the contractor or contractors, and be carried into effect without in any way violating or vitiating any contract that might have been made for work or materials connected therewith," it was held that the owner might insist upon departures from the specifications without violating the contract between them: Downing v. Graves, 55 Cal. 544, 548 (decided in 1880; suit by a person deemed to be a subcontractor for labor and materials, but no lien was attempted to be enforced).

the statutory original contract is subject to change and modification by the parties thereto.[8] The statute,[9] however, does not, in express terms, make the alterations of a valid statutory original contract void for failure to comply with any of the essential formalities of the statutes; but, under the provision of section eleven hundred and eighty-four,[10] above quoted, the alterations of such contracts, so far as they relate to payments, must comply substantially with the provisions of the last-named section; otherwise the claimant may have a lien for the value of the labor done and materials furnished.[11]

Section twelve hundred and one, above quoted, applies to the alterations of statutory original contracts which affect or impair a lien already acquired, but not to non-statutory original contracts;[12] and, independently of such a provision, where there was an original contract, the owner and con-

After amendment of § 1184 and enactment of § 1201, where the statutory original contract provided that the owner is at liberty to have changes or alterations made without affecting the contract, the cost thereof to be added or subtracted, as the case might be, and a second and unrecorded contract was made amending the first, the court deemed it unnecessary to consider the fact of such amendments, as the first and original contract was held void for want of filing, the court adding (Downing v. Graves, supra): "They were not filed, and neither add to nor detract from the original as a valid contract": Greig v. Riordan, 99 Cal. 316, 318, 321, 33 Pac. Rep. 913.

Section 1183 does not expressly require the filing of alterations of the original contract, and where the contract was abandoned, and there was a cessation of work for more than thirty days, which constituted a statutory completion of the building (see §§ 326 et seq., ante), for the purpose of setting the time running within which claims of lien must be filed, for all purposes of claiming a lien, it was held that a subsequent original contract entered into with another original contractor was as disconnected from the first original contract as if it had been for the construction of a different building: Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651.

Washington. Where the material-man delivered a quantity of brick at the ruling price in the market, and when the price fell he threw off fifty cents a thousand, it was held that "this was a mere modification of the contract, and not a different one": Fairhaven L. Co. v. Jordan, 5 Wash. 729, 734, 32 Pac. Rep. 729.

[8] Howe v. Schmidt (Cal. Sup.), 90 Pac. Rep. 1056 (dictum).

[9] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[10] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[11] Previously, and under the amendment of 1885 to § 1183, **Kerr's Cyc. Code Civ. Proc.,** the penalty for failure to comply substantially with § 1184 was to render the contract or alteration wholly void.

[12] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 245, 65 Pac. Rep. 378. See § 214, ante.

tractor could not, by an alteration of the contract, impair the liens of sublienors already acquired, without their consent.[13]

§ 329. Same. Alterations, how evidenced. Effect. It has been held that a contract for extra work, or for an extension of time,[14] under a building contract, is not required to be in writing, if the original contract was not required to be written.[15] A substantial performance of the contract, according to the terms and conditions agreed upon, is a condition precedent to the contractor's right to maintain an action to foreclose a lien, but a contract in writing may be altered by a contract in writing, or by an executed oral agreement,

[13] **Under act of 1862, § 10** of which simply provided, as § 1184 now does, that payments made prior to the time when they fell due were of no effect against the claimants under the original contractor, and the act contained no provision as above set forth as to the contract. And it was said in Davis v. Livingston, 29 Cal. 283, 291: "It is assumed in the theory of the act that tradesmen, before furnishing materials to the contractor, and laborers, before entering his service, will inform themselves as to whether a written contract has been made, and if so, then that they will, by inspection or otherwise, ascertain its provisions; and if they conclude to deal with the contractor, the one supplying him with materials, and the other with labor, they are presumed to do so on the faith of the original contract to which they have thus had access. And it follows that no agreement subsequently made between the principal parties, unless seasonably disclosed to the workmen and material-men, can be set up to their disadvantage."

And, under the same act, it was held that a change could not be made in the original contract without the consent of subordinate lien claimants, or timely notice thereof to them before the interest of the lien-holder attached: Shaver v. Murdock, 36 Cal. 293, 297; White v. Soto, 82 Cal. 654, 657, 23 Pac. Rep. 210 (an action by a contractor on a contract providing for alterations). At this time the contract was not required to be filed, and § 1201 was not in force; but it seems to have been then held that, between the original contractor and the owner, the contract may be changed subsequently by oral agreement: White v. Soto, supra.

Subsequent agreement, whereby the owner, in consideration of a deduction of two hundred dollars made by the contractor from the contract price, agreed to perform certain specified work after the completion of the building, and released the contractor from his contract obligation to perform the same, is governed by the same rule of law: Shaver v. Murdock, 36 Cal. 293, 297.

[14] **Time for performance of contract** (non-statutory) may be subsequently enlarged by parol: Luckhart v. Ogden, 30 Cal. 547; Wangenheim v. Graham, 39 Cal. 169.

[15] Barilari v. Ferrea, 59 Cal. 1, 4 (action by contractor, under §§ 1183 and 1184 of the Code of Civil Procedure, as they stood in 1876; § 1201 was not in force). See **Kerr's Cyc. Civ. Code, § 1698,** and note.

and when the contract as modified is thus performed in accordance with such modifications, the failure to finish the building in accordance with the original terms of the contract does not affect the right to foreclose the lien.[16]

Where owner accepts performance of contract as modified, he cannot refuse to pay the balance of the contract price on the ground that the contract was not performed as originally agreed,[17] and where the contract is modified by the parties one day prior to the time when the original contract should have been completed, it necessarily extended the time of performance, and is a waiver of damages for the delay.[18]

§ 330. Same. Extending credit. There is nothing in section eleven hundred and ninety[19] indicating that the credit therein mentioned refers to liens based on direct contract with the owner; its language makes it applicable to all liens; and were section twelve hundred and one[20] construed as invalidating the terms of credit between the owner and the original contractor when the same affected or impaired other liens, still section eleven hundred and ninety would apply to liens other than those inhibited by section twelve hundred and one.[21]

[16] Anderson v. Johnston, 120 Cal. 657, 659, 53 Pac. Rep. 264 (non-statutory original contract).

Washington. Where the original contract required written evidence of alterations of the contract, the owner waives this provision by orally directing alterations which are accepted by the contractor: Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784 (action on contractor's bond).

[17] Boothe v. Squaw Springs W. Co., 142 Cal. 573, 578, 76 Pac. Rep. 385.

Colorado. Where a modification of the original contract is made under a provision therein allowing such modification, the contractor cannot sue for damages resulting from such modification: City and County of Denver v. Hindry (Colo.), 90 Pac. Rep. 1028.

[18] McGinley v. Hardy, 18 Cal. 115.

[19] **Kerr's Cyc. Code Civ. Proc.,** § 1190.

[20] **Kerr's Cyc. Code Civ. Proc.,** § 1201, and note.

[21] Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

Legislature cannot extinguish the constitutional mandatory liens at the expiration of the credit extended, or at any other time, but may only legislate with reference to the remedy: Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

See "Waiver," §§ 627 et seq., post; "Impairment," § 284, ante.

§ 331. **Same. Payments.** This subject has already received attention under other heads.[22] An alteration in the statutory original contract, under which a payment was to be made to the contractor when the building was "completed and aeeepted by the architeet," is not invalid as against lien elaimants who have not served notice on the owner under section eleven hundred and eighty-four,[23] when the owner waives the certifieate of the architect, the provision of seetion twelve hundred and one[24] as to waiving, affecting, or impairing the liens of other persons not applying to an instalment payable at the completion of the building.[25]

Rights of owner and claimant. It was held in an early case that the owner and claimant have the right to rescind an arrangement for the extension of payment of a debt legally and justly entered into under mistake as to the application of a law allowing such extension, provided that the rights of no third party intervened, which it would be inequitable to disturb: Gamble v. Voll, 15 Cal. 508, 510.

[22] See §§ 251, 269-280, ante.

[23] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[24] **Kerr's Cyc. Code Civ. Proc.,** § 1201.

[25] Valley L. Co. v. Struck, 146 Cal. 266, 272, 80 Pac. Rep. 405 (but such payment, or waiver of the certificate, not valid as against lien claimants who had given such notice before such payment. Per Shaw, J., Angellotti, J., and Beatty, C. J., concurring). See also Newport W. & L. Co. v. Drew, 125 Cal. 585, 58 Pac. Rep. 187.

Compare § 10, act of 1862. It seems to have been held that if the payment had been made previous to the time set forth in the contract, whether notice is given or not, the subclaimant would have a lien for the amount so paid, under a contract to which this provision is applicable: Henry v. Wadsworth, 38 Cal. 356, 360 (1862). See Quale v. Moon, 48 Cal. 478, 482. See "Payments," §§ 269-280, ante, and "Notice," § 547, post, and see Valley L. Co. v. Struck, 146 Cal. 266, 80 Pac. Rep. 405, concurring opinion of Shaw, J. (p. 272): "Nor does the statute declare, as the main opinion seems tacitly to assume, that it is only payments made prior to the times mentioned in the statute itself which cannot be prematurely made without subjecting the owner to liability to pay again."

In the absence of direction, application of payments is made to the earliest debt in date of maturity, and application should be made pro rata on obligations maturing at the same time, although they may not have been contracted at the same time: Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 498 (under § 1479, subd. 3, **Kerr's Cyc. Civ. Code;** and see note to same).

See also § 254, ante.

Colorado. A covenant in the original contract to relieve the owner from any liability for liens is void, under Laws of 1893, p. 316, § 2, requiring the owner to withhold a certain percentage of the contract price for thirty-five days after the completion of the contract: Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846; 3 Mills's Ann. Stats., 1st ed., § 2867a, repealed by 3 Mills's Ann. Stats., 2d ed., § 2887.

Utah. See Morrison v. Carey-Lombard L. Co., 9 Utah 70 (1890), 33 Pac. Rep. 238. See Carey-Lombard L. Co. v. Partridge, 10 Utah 322 (1890); Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764 (1888).

§ 332. **Same. Power of architect to alter contract.** The architect has no power, as such, to change the contract or plans in material respects, of his own volition, unless such power is expressly conferred on him by the contract; otherwise it would be in his power to give the owner a different building than that he contracted for, and perhaps bankrupt the owner. So he cannot raise the foundation of a building eighteen inches, which involved an increased cost of seventeen hundred dollars.[26]

§ 333. **Novation.** Novation is the substitution of a new obligation for an existing one.[27] The assignee of the contractor takes the assignment with the burdens.[28]

Where the original contractor assigns his whole contract before performance, and a new contractor steps into his shoes, with the knowledge and consent of the owner, and assumes all liabilities, without any new contract, he is the only person with whom the owner is to settle, and there is but one contract on the part of the owner; and the first contractor, on final settlement, is entitled to nothing.[29]

[26] Gray v. La Société Française de B. M., 131 Cal. 566, 571, 63 Pac. Rep. 848.

See § 125, ante.

[27] **Kerr's Cyc. Civ. Code,** § 1530, and note. See also **Kerr's Cyc. Civ. Code,** §§ 1531-1533, and notes.

See, generally, Long Beach School Dist. v. Dodge, 135 Cal. 401, 406, 67 Pac. Rep. 499.

Montana. The contractor cannot plead that the owner assumed the debt of a subclaimant, unless it be shown that there was a novation which released the contractor: Aldritt v. Panton, 17 Mont. 187, 42 Pac. Rep. 767.

Oklahoma. See Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

Oregon. See Gray v. Jones (Oreg.), 81 Pac. Rep. 813; North Pacific L. Co. v. Spore, 44 Oreg. 462, 75 Pac. Rep. 890.

Washington. See Anderson v. McDonald, 31 Wash. 274, 71 Pac. Rep. 1037; Brodek v. Farnum, 11 Wash. 565, 40 Pac. Rep. 189; Littell v. Miller, 8 Wash. 566, 28 Pac. Rep. 1035.

[28] Rauer v. Fay, 128 Cal. 523, 526, 61 Pac. Rep. 90.

The original contractor cannot shift the burden of the obligation of a bond to claimants by assigning the contract without the consent of the persons entitled to sue on the bond: French v. Powell, 135 Cal. 636, 642, 68 Pac. Rep. 92.

[29] Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 619, 25 Pac. Rep. 124; Gordon H. Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 623, 25 Pac. Rep. 125.

Compare: Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651. See "Assignees," § 588, post.

Assignment made by original contractor to another person, by way of novation, before the completion of the work, vests in the assignee, prior to the expiration of thirty-five days from the date of the completion of the work, no rights different from or superior to those of the original contractor; but a mere novation of the original contract for the completion of the structure, by assignment to another contractor, would not affect the right of set-off or counterclaim as against the original contractor.[30]

Fact that purchaser of estate property, who assumed a debt for work done thereon under a contract with the executor, was not disturbed in possession does not estop him from avoiding a mechanic's lien on the property for such work.[31]

§ 334. Performance of contract. How considered herein.[32] The fact of performance of the contract, or completion of the building, improvement, or structure, may be viewed from two standpoints: 1. As a circumstance giving rise to a right to a lien or cause of action; and 2. As the point marking the commencement of the period within which claims of lien must be filed under section eleven hundred and eighty-seven.[33] As to the first, it is evident that the completion of the building may be the performance of a part, only, of the work under the contract, and that the completion of the former may not be coincident with the performance of the latter.[34] For convenience, however, these subjects will be considered under one head.

The term "completion," in the absence of any statutory qualification or definition, would be construed to mean actual completion, and there would be no room for its construction by the court.[35] But, for the purpose of filing liens,

[30] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 63, 67, 40 Pac. Rep. 45. See Downing v. Graves, 55 Cal. 544, 548.

See "Notice," §§ 547 et seq., post.

[31] San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 223, 66 Pac. Rep. 255.

[32] See §§ 348 et seq., post.

[33] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[34] **Hawaii.** Completion of contract not synonymous with completion of the building: Pacific H. Co. v. Lincoln, 12 Hawn. 358, 361.

[35] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Schallert-Ganahl L. Co. v. Sheldon (Cal.), 32 Pac. Rep. 235.

Colorado. Lichty v. Houston L. Co. (Colo.), 88 Pac. Rep. 846.

section eleven hundred and eighty-seven [36] made the occupation, use, or acceptance of a building, etc., or cessation from work for thirty days on an unfinished building, the equivalent of completion, irrespective of its actual completion. These subjects will be considered in the following sections.

§ 335. **Same. Original contract valid.** Where the original contract is valid, sublienors are bound by its terms, and the non-completion or non-performance of the original contract by the original contractor would be followed by a corresponding limitation upon the rights of the sublienors, as well as upon those of the original contractor; [37] and proper deductions would be made for trifling imperfections in the work.[38]

When the contractor has furnished, through himself or his subcontractors, all the work and materials which he has agreed to furnish, then the building is complete, so far as he and his subclaimants are concerned; and they may then file their respective claims of lien, and each will then become entitled to his proper share of the fund.[39]

§ 336. **Same. Original contract void.** Where, however, the statutory original contract is void, it has already been shown [40] that sublienors have a lien dependent entirely upon the statute, and not upon the contract. But the contract for the erection of a building, although void, is nevertheless admissible, in an action to foreclose the lien, to determine the character of the building to be erected, and thereby to furnish the test by which it can be known when the building is complete, and the court say: "It is sufficiently difficult, at the present time, for lien claimants to determine the true

[36] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[37] See §§ 315-318, ante.

[38] See "Liability of Owner," §§ 523 et seq., post; "Cumulative Remedies," §§ 638 et seq., post.

Washington. See Washington B. Co. v. Land & R. Imp. Co., 12 Wash. 272, 40 Pac. Rep. 982.

[39] Roylance v. San Luis Hotel Co., 74 Cal. 273, 278, 20 Pac. Rep. 573, **quoting and approving** Perry v. Brainard (Cal.), 8 Pac. Rep. 882, 8 West Coast Rep. 4.

[40] See "Void Contract," §§ 315 et seq., and Giant Powder Co. v. San Diego F. Co., 97 Cal. 263, 266, 32 Pac. Rep. 172.

date at which they should file their notice [claim] of liens, but if the contract as to the character of the building to be erected is not to furnish a test of completion, then no test is known to the law, and the difficulties in their way would be absolutely insurmountable." [41] And where such contract is void, although it cannot be enforced, the contractor may nevertheless lawfully perform it, and the owner accept such performance, and neither party be guilty of any wrong in so doing.[42]

§ 337. **Same. Time of performance.** Neither at law nor in equity is a contracting party excused from performing his contract within the time agreed upon, further than that, in certain contracts, failure to perform strictly according to the contract, as to time, does not authorize the other party to rescind. He may always, however, recover any damage he has suffered in consequence of such failure. The statement that time is not of the essence of the contract is misleading in any case, and has no force whatever in an action at law. In such cases, to enable one to rescind for a breach on the part of the other party, the failure must be as to a material matter, and depends upon the circumstances of the case. Cases in equity in which this rule is applied are usually for the specific performance of contracts for the purchase of land. Often the failure is merely to pay at a specified date. A slight delay in such a case is usually of no great importance, and the detriment is easily compensated in interest. An agreement to construct or to render services is quite different. There, as a general rule, time is of importance.[43]

Where no time is specified, the contract must be performed within a reasonable time, and this is a question of fact, depending upon the character of the enterprise, the obstacles

[41] Barker v. Doherty, 97 Cal. 10, 12, 31 Pac. Rep. 1117. See Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 197, 20 Pac. Rep. 419, s. c. 97 Cal. 263, 32 Pac. Rep. 172. Notwithstanding the amendment of 1897 to § 1187, this language seems applicable.

See "Filing Claim," §§ 416 et seq., post, and § 315, ante.

[42] Kiessig v. Allspaugh, 91 Cal. 234, 237, 27 Pac. Rep. 662, 13 L. R. A. 418.

[43] American Type Founders' Co. v. Packer, 130 Cal. 459, 462, 62 Pac. Rep. 744. See Harlan v. Stufflebeem, 87 Cal. 508, 25 Pac. Rep. 686.

to be overcome, the length of time required by diligent and proper effort to do the work, and the surrounding circumstances.[44]

§ 338. **Same. General rule. Conditions.** Where the contractor is employed under a special contract, he must show that he has completed the contract, and where mutual promises are concurrent and dependent, neither party can demand performance without performance on his part.[45] When the contract provides that the structure shall be built under the direction and to the satisfaction of an agent or superintendent of the owner, his acceptance is binding and conclusive, in the absence of fraud or mistake.[46] Where performance is tendered, it must not be subject to any condition to which the party is not entitled.[47]

§ 339. **Same. Excuses for non-performance.** The contractor who has contracted to do so must perform, even where the whole work is consumed by fire, without apparent fault of either party.[48] In those cases where the owner re-

[44] See Los Angeles T. Co. v. Wilshire, 135 Cal. 654, 657, 67 Pac. Rep. 1086.

Washington. Delay in performance as breach of contract: See Beebe v. Redward, 35 Wash. 615, 77 Pac. Rep. 1052.

[45] Ernst v. Cummings, 55 Cal. 179, 184; First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45; Pacific R. M. Co. v. English, 118 Cal. 123, 128, 50 Pac. Rep. 383 (subcontractor); Anderson v. Johnston, 120 Cal. 657, 659, 53 Pac. Rep. 264.

See **Kerr's Cyc. Code Civ. Proc.,** § 1439, and note.

Concurrent conditions: See Russ L. & M. Co. v. Muscupiabe L. & W. Co., 120 Cal. 521, 526, 52 Pac. Rep. 995, 65 Am. St. Rep. 186.

Colorado. See McGonigle v. Klein, 6 Colo. App. 306, 40 Pac. Rep. 465; Cochran v. Balfe, 12 Colo. App. 75, 54 Pac. Rep. 399.

[46] Moore v. Kerr, 65 Cal. 519, 521, 4 Pac. Rep. 542, citing Smith v. Brady, 17 N. Y. 177; Wyckoff v. Meyers, 44 N. Y. 145; Stewart v. Keteltas, 36 N. Y. 388; Hudson v. McCartney, 33 Wis. 340.

[47] Jones v. Shuey (Cal., April 3, 1895), 40 Pac. Rep. 17; Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637.

An offer to dig another well, when the one constructed was incomplete, is not an offer to perform: McPherson v. San Joaquin County (Cal., March 24, 1899), 56 Pac. Rep. 802.

Tendering performance without condition: See Schindler v. Green (Cal. App., Aug. 14, 1905), 82 Pac. Rep. 341, 631; on rehearing, 149 Cal. 752.

[48] Clark v. Collier, 100 Cal. 256, 258, 34 Pac. Rep. 677. And see Hogan v. Globe Mut. B. & L. Assoc., 140 Cal. 610, 613, 74 Pac. Rep. 153.

See "Construction of Contracts," § 216, ante, and § 353, post.

serves the right to terminate the contract at any stage of the work, the contractor cannot recover damages for not being permitted to complete the same;[49] but when, entirely through the fault of the owner, the contractor fails to complete the contract within the time[50] or in the manner[51] agreed in the contract, the contractor may recover.[52] While a prevention of performance may excuse performance,[53] yet

As to destruction of building by fire before completion, and effect on right to lien, see 2 Am. & Eng. Ann. Cas. 689-691, 812.

As to lien on land where improvement destroyed by fire before completion, see note 2 Am. & Eng. Ann. Cas. 812.

Washington. So where the subcontractors fail to furnish the material to enable the contractor to complete the building in time; or where the delay was owing to the severity of the weather, if, regardless of this, the work could have been carried on with safety and durability by the exercise of extra means or effort on the part of defendant during the continuance of such weather; for "presumably they took this into consideration, and demanded a higher price for their work by reason of these necessary inconveniences, and on account of the extra expenses incident to building in the winter": Reichenbach v. Sage, 13 Wash. 364, 43 Pac. Rep. 354, 52 Am. St. Rep. 15.

[49] McPherson v. San Joaquin County (Cal., March 24, 1899), 56 Pac. Rep. 802.

[50] White v. Fresno Nat. Bank, 98 Cal. 166, 167, 32 Pac. Rep. 979. Likewise when the delay is owing to an agreed modification of the contract, the owner cannot set off damages for the delay: McGinley v. Hardy, 18 Cal. 116.

[51] Gray v. Wells, 118 Cal. 11, 15, 50 Pac. Rep. 23, in which it was held that a wall cannot be said to be fully constructed until the cement has had time to set and become hardened, and any act during that time which causes an injury to it may properly be treated as an act done during the process of construction.

As to furnishing of improper material by owner, see McPherson v. San Joaquin County, 56 Pac. Rep. 802.

Oregon. Justice v. Elwert, 28 Oreg. 460, 43 Pac. Rep. 649.

[52] Gamache v. South School Dist., 133 Cal. 145, 149, 65 Pac. Rep. 301. See McConnell v. Corona City W. Co., 149 Cal. 60, 63, 85 Pac. Rep. 929.

Montana. See Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

Washington. See Cochran v. Yoho, 34 Wash. 238, 75 Pac. Rep. 815 (a subsequent notice to proceed with the work will not relieve the owner from liability for damages occasioned by wrongfully stopping the work). And see Olson v. Snake R. V. R. Co., 22 Wash. 39, 60 Pac. Rep. 156; Anderson v. McDonald, 31 Wash. 274, 71 Pac. Rep. 1037.

[53] Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487; Adams v. Burbank, 103 Cal. 646, 649, 37 Pac. Rep. 640.

Prevention of performance: See McConnell v. Corona City W. Co., 149 Cal. 60, 64, 85 Pac. Rep. 929; Cook v. Columbia O. A. & R. Co., 144 Cal. 670, 675, 78 Pac. Rep. 287.

Injunction preventing performance is not an excuse for nonperformance, within § 1511 of the Code of Civil Procedure: Sample v. Fresno F. & I. Co., 129 Cal. 222, 61 Pac. Rep. 1085.

See "General Obligations of Original Contractor," §§ 64, 65, ante; "Obligations of Owner," §§ 523 et seq., post.

a direction, authorized by the contract, that the force of men be reduced,[54] or the non-payment of an instalment,[55] is not such prevention.

In order to make payment a condition precedent, a clause must be inserted in the contract to that effect.[56] Such failure to make payments is a substantial breach of the contract, entitling the contractor to rescind and sue upon a quantum meruit.[57] But where the contractor has not performed the contract according to its terms when he demands such payment of an instalment, then it is not due, and he is not justified in leaving the work.[58]

Colorado. McGonigle v. Klein, 6 Colo. App. 306, 40 Pac. Rep. 465; Cochran v. Balfe, 12 Colo. App. 75, 54 Pac. Rep. 399.

Idaho. Prevention: See Spaulding v. Cœur D'Alene R. & N. Co., 5 Idaho 528, 51 Pac. Rep. 408 (plaintiff may recover on quantum meruit).

New Mexico. Baca v. Barrier, 2 N. M. 131.

[54] Cox v. McLaughlin, 54 Cal. 605, 607.

[55] Cox v. McLaughlin, 54 Cal. 605, 607, s. c. 76 Cal. 60, 18 Pac. Rep. 100, 9 Am. St. Rep. 164; Porter v. Arrowhead R. Co., 100 Cal. 500, 501, 503, 35 Pac. Rep. 146; Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635.

See "Obligations of Owner," §§ 523 et seq., post; "Evidence," §§ 764 et seq.

Application of payments: See Hanson v. Cordano, 96 Cal. 441, 442, 31 Pac. Rep. 457, and also § 254, ante.

[56] Cox v. McLaughlin, 63 Cal. 196, 205.

See "Complaint," § 676, post.

Oregon. See Justice v. Elwert, 28 Oreg. 460, 43 Pac. Rep 649.

[57] Porter v. Arrowhead R. Co., 100 Cal. 500, 501, 503, 35 Pac. Rep. 146; Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635; San Francisco B. Co. v. Dumbarton L. & I. Co., 119 Cal. 272, 274, 51 Pac. Rep. 335.

See "Complaint," §§ 672 et seq., post.

Objection that work was not done according to the contract is not a refusal to pay any sum at all, under the contract: Flinn v. Mowry, 131 Cal. 481, 486, 63 Pac. Rep. 724, 1006.

Montana. See Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

Oregon. And where the contractor agreed that "he will promptly pay, or cause to be paid, for all material" and labor, a failure to do so is a breach of the contract: Thompson v. Coffman, 15 Oreg. 631, 16 Pac. Rep. 713.

Utah. See Bennett v. Shaughnessy, 6 Utah 273, 22 Pac. Rep. 156.

Washington. See Anderson v. McDonald, 31 Wash. 274, 71 Pac. Rep. 1037.

[58] Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635. See Flinn v. Mowry, 131 Cal. 481, 486, 63 Pac. Rep. 724, 1006.

Colorado. Nor is he justified in abandoning the contract, simply because the owner demands the performance of services not stipulated in the contract: Cochran v. Balfe, 12 Colo. App. 75, 54 Pac. Rep. 399.

The fact that plaintiff continued work under the contract after default of defendant does not affect the right of the plaintiff to cease work upon continued non-payment; but plaintiff had a right to rely for a reasonable time upon the promises of defendant to pay; and where there appears to have been no difficulty in determining the amount due under the contract, the fact that the contract did not expressly provide a specific method of determining the amount due at the end of each month for the work already performed is immaterial; and where the defendant has first broken the contract by non-payment of an instalment due thereunder, he cannot insist that the plaintiff shall go on and complete the contract within the time specified; and there is no material error in excluding evidence to the point that plaintiff was informed that it was important to construct a levee within the time specified in the contract.[59]

§ 340. **Same. Performance of warranty.** The statute[60] providing that "one who manufactures an article, under an order, for a particular purpose, warrants by the sale that it is reasonably fit for that purpose," does not apply where the manufactured article is furnished under a contract demanding that it be made according to specific plans and specifications; for, under such circumstances, the purchaser selects the article, and gets exactly what he orders, and, in the absence of an express warranty, assumes the risk following the

[59] San Francisco B. Co. v. Dumbarton L. & I. Co., 119 Cal. 272, 274, 51 Pac. Rep. 335.

Colorado. Where a building was to be completed within a given time, the value of the rental between that time and the time of actual completion may be recouped, unless by settlement, intended to be final, such damages were waived, either expressly or by implication. Where the owner permits the contractor to continue work after the expiration of the time in which the work was to be completed, he waives the right to rescind on that ground. But by consenting to the extension, he does not thereby waive such damages as he may have sustained by reason of the delay: McIntyre v. Barnes, 4 Colo. 85. See Cary v. McIntyre, 7 Colo. 177, 2 Pac. Rep. 916.

If, during the progress of construction, some portion of the work finished, or partially so, but before the entire completion of the building, should become broken, damaged, or be found unsuitable, the repairing of the same becomes a part of the work of construction: Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744.

[60] See **Kerr's Cyc. Civ. Code,** § 1770, and note.

purchase.[61] But where, notwithstanding the fact that certain specifications are made part of the contract, there is a guaranty of the efficiency, or an express warranty of the scheme, as well as an undertaking to do good work in the furnishing of the plant in accordance with the scheme, the rule is otherwise.[62]

§ 341. **Same. "Trifling imperfection."** In the last clause of section eleven hundred and eighty-seven,[63] in recognition of the general rule hereafter referred to, it is provided that any trifling imperfection in the work, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien.

Whether an imperfection in the work for which a lien is sought is a trifling one or not, is to be determined from the facts and circumstances of each particular case. No fixed or flexible rule upon the point can be laid down.[64]

The term "trifling imperfection," as used in this section of the statute, relates to the question whether or not there has

[61] And so the fact that the size of a drum specified in a contract to construct an elevator proved to be insufficient is immaterial: Bancroft v. San Francisco T. Co., 120 Cal. 228, 232, 52 Pac. Rep. 496.

See "Construction of Contract," §§ 216 et seq., ante.

Utah. See Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986 (caveat emptor).

[62] **Where a material-man agreed to furnish an ice plant, built according to certain specifications, and guaranteed** its efficiency, he is liable for its failure to do the work, though the specifications were furnished by the purchaser, and an efficient ice plant could not be constructed by following them: Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637, 639; and see Boothe v. Squaw Springs W. Co., 142 Cal. 573, 577, 76 Pac. Rep. 385.

[63] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[64] Schindler v. Green, 149 Cal. 752, 754, 87 Pac. Rep. 626.

Trifling imperfection: Schindler v. Green, 149 Cal. 752, 755, 87 Pac. Rep. 626, reversing, on this point, s. c. (Cal. App., Aug. 14, 1905) 82 Pac. Rep. 341, 631 (windows out of alignment, remedied at a cost of $7.50).

The neglect to put on a door-knob, which was mislaid, and the rim of a bath-tub, has been held a trifling imperfection: Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896.

In the case of a contract to excavate a cellar, and to erect walls of concrete and steps to the street, which was accepted by the owner as completed, and thereafter a carpenter, employed by the owner, finished a frame in the cellar-door, and plaintiff, at the owner's request, filled a small hole outside the cellar, it was held that the lack of this additional work was a trifling imperfection, within the meaning of the section, and that there was an acceptance of the work: Lippert v. Lazar (Cal.), 33 Pac. Rep. 797.

been an actual completion of the building,[65] and refers to imperfect or defective performance of the work upon a building which is claimed to have been completed, and not to a case in which the building is admittedly uncompleted, and the workmen are still engaged in constructing substantial portions thereof.[66] It cannot be said as a matter of law that any failure of completion is a trifling imperfection.[67]

What constitutes a trifling imperfection,[68] or whether there has been a completion, or the contract has been substantially

Failure to make the ridge of the roof tight, or to putty the window glass on the outside, is a defective performance of the work, rather than the failure to complete the building, and was considered a "trifling imperfection": Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 379, 51 Pac. Rep. 555.

Where some small places in the house are not properly grained and finished, and the cost of properly finishing them would be not more than five dollars, this was held a substantial performance of the contract: Harian v. Stufflebeem, 87 Cal. 508, 512, 25 Pac. Rep. 686 (contract price $145).

In the case of seven dollars' worth of alterations, where the contract price is four thousand seven hundred dollars, same rule applies: Santa Ciara V. M. & L. Co. v. Williams (Cal.), 31 Pac. Rep. 1128. In this case the contractors did nothing after they delivered their work, and there was no evidence that they did not complete the house according to the directions and designs of the owner, there being no valid statutory original contract. But in McIntyre v. Trautner, 63 Cal. 429, the owner refused to accept the work from the contractor as perfectly complete, and the owner completed the work, which consisted in stopping some leaking pipes.

Colorado. There may be a substantial performance, notwithstanding the amount required to remedy defects and omissions may be quite substantial: Charles v. Hallack L. Co., 22 Colo. 283, 293, 43 Pac. Rep. 548.

It is not competent for mechanics, by performing work and trifling alterations, to extend the time within which a lien may be filed: Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83.

Hawaii. See Pacific H. Co. v. Lincoln, 12 Hawn. 358, 359.

Washington. So an expenditure of thirty dollars on a bridge costing sixteen thousand dollars: Washington Bridge Co. v. L. & R. Improvement Co., 12 Wash. 272, 40 Pac. Rep. 982.

[65] Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 336, 31 Pac. Rep. 164; Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610; Schindler v. Green, 149 Cal. 752, 754, 87 Pac. Rep. 626.

[66] Schindler v. Green, 149 Cal. 752, 754, 87 Pac. Rep. 626; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 Pac. Rep. 555.

[67] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 208, 29 Pac. Rep. 633. See "Questions of Fact," § 827, post.

[68] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 238; Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 334; Willamette S. M. Co. v. Kremer, 94 Cal. 205, 208; Coss v. MacDonough, 111 Cal. 662, 666; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 378 (there was no test by which it could be determined when the building was completed).

Colorado. Lichty v. Houston L. Co. (Colo.), 88 Pac. Rep. 846.

performed,[69] and the time of completion,[70] are all questions of fact, to be determined from the facts and circumstances of each case.

§ 342. Same. Substantial performance generally required. The performance of a contract need not in all cases be literal and exact, in order to entitle a party to compensation therefor. Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done, or the manner of its performance, is the sole matter in dispute, and is to be decided upon conflicting testimony. In contracts for the construction or repair of buildings, a substantial performance of his contract is sufficient to entitle the contractor to compensation for the work done by him under the contract, as well as to permit the filing of a claim of lien therefor.[71] If there has been no wilful departure from its provis-

[69] Harlan v. Stufflebeem, 87 Cal. 508, 512; Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 334; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237.

[70] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 208; Schallert-Ganahl L. Co. v. Sheldon (Cal.), 32 Pac. Rep. 235.

[71] Harlan v. Stufflebeem, 87 Cal. 508, 511, 25 Pac. Rep. 686; Schindler v. Green, 149 Cal. 752, 754, 87 Pac. Rep. 626; Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487; Stimson M. Co. v. Riley (Cal.), 42 Pac. Rep. 1072; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. Rep. 629; West Coast L. Co. v. Apfield, 86 Cal. 335, 342, 24 Pac. Rep. 993. And see Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635; Marchant v. Hayes, 117 Cal. 669, 672, 49 Pac. Rep. 840.

See "Filing of Claim," §§ 416 et seq., post.

Substantial performance: See Los Angeles T. Co. v. Wilshire, 135 Cal. 654, 659, 67 Pac. Rep. 1086.

Substantial non-performance as to laying floor: Laidlaw v. Marye, 133 Cal. 170, 179, 65 Pac. Rep. 391.

Substantial compliance to recover: Laidlaw v. Marye, 133 Cal. 170, 176, 65 Pac. Rep. 391.

Montana. Substantial performance as condition to payment: Riddell v. Peck-Williamson H. & V. Co., 27 Mont. 44, 69 Pac. Rep. 241.

Failure to plaster a portion of a house and build a flue, held a failure to substantially perform contract: Franklin v. Schultz, 23 Mont. 165, 57 Pac. Rep. 1037.

Nevada. The original contract and modifications thereof must be completely performed, in order to start the time running within which to file claims of lien: Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632.

New Mexico. A substantial completion of the building is a completion thereof, within the meaning of Comp. Laws 1897, § 2221, for the purpose of filing claims of lien: Genest v. Las Vegas M. B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743 (seven or eight hours' work remaining to be done).

ions, and no omission of any of its essential parts, and the contractor has in good faith performed all of its substantive terms,[72] he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed. If the omission or imperfection is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated therefor by a recoupment for damages, the contractor does not lose his right of action. This rule is peculiarly applicable in a case where the other party has received the benefit of what has been done, and is enjoying the fruits of the work;[73] especially where the failure of the plaintiff to comply with the strict letter of the contract was caused by the acts and consent of the parties.[74]

Oregon. Substantial performance of the contract sufficient: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390.

Washington. Washington B. Co. v. L. & R. Improvement Co., 12 Wash. 272, 40 Pac. Rep. 982.

See Craig v. Geddis, 4 Wash. 390, 30 Pac. Rep. 396; Schmidt v. City of North Yakima, 12 Wash. 121, 40 Pac. Rep. 790.

Trifling imperfection: See Windham v. Independent Tel. Co., 35 Wash. 166, 76 Pac. Rep. 936 (falling within the principle of Schmidt v. North Yakima, 12 Wash. 121, 40 Pac. Rep. 790).

See § 341, ante.

Substantial failure to perform, necessary; otherwise contractor not liable: Anderson v. Harper, 30 Wash. 378, 70 Pac. Rep. 965.

"Substantial performance" and "substantial failure" to perform: See Anderson v. Harper, 30 Wash. 378, 70 Pac. Rep. 965.

[72] **Good faith in performance:** See Schindler v. Green (Cal. App., Aug. 14, 1905), 82 Pac. Rep. 631, s. c. on rehearing, 149 Cal. 752, 82 Pac. Rep. 341.

[73] Schindler v. Green, 149 Cal. 752, 754, 755, 87 Pac. Rep. 626; Harlan v. Stufflebeem, 87 Cal. 508, 511, 25 Pac. Rep. 686. See Valley L. Co. v. Struck, 146 Cal. 266, 273, 80 Pac. Rep. 405.

Substantial performance: See, generally, note 30 Am. St. Rep. 616.

Oregon. After a structure has been completed, inspected, and approved by the owner or his lawful agent, any latent defects existing in the material or workmanship that may be cured by the builder upon the request of the owner are to be considered as repairs, and not omissions in the performance of the original contract, and the time for filing the lien will begin to run from the date when the building was accepted, though the rule may be otherwise where work required by the contract has been omitted. And when work has been apparently completed, but not accepted, the restoration by the builder of a part to which objection has been made is considered as a substitution under the 'erms of the original agreement, and not a repair, and therefore the statute begins to run only from the final completion of the imperfectly performed obligation: Avery v. Butler, 30 Oreg. 287, 47 Pac. Rep. 706.

[74] Griffith v. Happersberger, 86 Cal. 605, 612, 25 Pac. Rep. 137, 487.

Colorado. Waiver of strict performance: See Flick v. Hahn's Peak & E. R. C. & P. M. Co., 16 Colo. App. 485, 66 Pac. Rep. 453.

§ 343. Same. General principles.[75] The owner has a right to have built the structure he contracted for, and not another. Even his caprices, if expressed in the contract, must be complied with, even though they would not have added to the value of the structure, or may have lessened its value. It is only when this plan has been substantially embodied in the work that the court can have an occasion to estimate the deficiencies. The authorities are very clear upon this point. There is a variety of cases to which the so-called modern equitable rule has been applied. One is where the contractor fails to complete the structure. In such case it is said, if the contractor has done or furnished anything of which the owner avails himself, such owner may be made to pay the

Montana. Intention to waive defects, when not inferred: See Franklin v. Schultz, 23 Mont. 165, 57 Pac. Rep. 1037.

Oregon. Or waived by them: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390.

[75] **Illustrations of failure to substantially perform.** Where, under a contract to repair an old house and build an addition, there was evidence that no part of the second coat of paint upon the new part, as required by the contract, had been put on; that the work-bench of the carpenters, and the paint for the second coat, were in the new part at the time of a fire, which consumed the building; that two of the doors were not hung, no lock or fastenings on the front door, and no fastenings on the windows; that the house had not been delivered to the owner, and the lower court found that the contractor had never finished the building or completed the house, and that the owner had never accepted it, — it cannot be said that the building was substantially completed: Clark v. Collier, 100 Cal. 256, 259, 34 Pac. Rep. 677.

As to destruction of building by fire, before completion, see 2 Am. & Eng. Ann. Cas. 689-691, 812.

Where contractor used old, second-hand brick of poor quality, instead of good, hard brick, and laid them in five and six courses instead of seven, and constructed only six piers of brick laid in three courses instead of twelve piers, and used second-class lumber instead of the best kind, as agreed, it was held not to be a substantial compliance with the contract: Perry v. Quackenbush, 105 Cal. 299, 303, 38 Pac. Rep. 740.

Failure to use designated lath and rustic. A contract calling for laths one and a quarter inches wide is not satisfied by laths one and a half inches wide, and where a contract calls for No. 1 rustic and the best quality of joist and studding, and the contractor uses second quality of joist and studding and No. 2 rustic, there is a substantial breach of the contract: Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 117, 38 Pac. Rep. 635.

Where neither the doors were hung, the plumbing finished, the closets and bathroom completed, the ventilators placed, nor the molding put in, and a number of other things were unfinished, such things are not trifling imperfections, and are necessary to be done to complete the building: Schallert-Ganahl L. Co. v. Sheldon (Cal.), 32 Pac. Rep. 235 (under amendment of 1887 to § 1187, Code Civ. Proc.). The

value of it, after deducting all damages resulting from the failure of the contractor. In such case it has been sometimes said that it does not matter why the contractor failed to perform. Another case is where there is a defect which can be remedied. Here the contractor may recover the contract price, less damages caused by the failure, including cost of supplying the deficiency. Another case is where the contractor has endeavored in good faith to perform his contract, and has substantially performed, but there are some unimportant defects, arising through accident or inadvertence. Here, the defects not being such as defeat or materially change the design embodied in the contract, the contractor may recover, less damages occasioned by the failure. In such case there must be a substantial performance of every material covenant in the contract, and the failure must not have resulted from design or bad faith, and whether these facts exist is a matter to be determined by the jury.

Since the rule as to what shall constitute performance has become so indefinite, it is an important consideration, in determining whether there has been a substantial performance, that the deviations are so slight that they might have been made by one who was honestly endeavoring to comply with his contract. Good faith, however, on the part of the contractor is not enough. The owner has a right to a structure in all essential particulars such as he has contracted for; and to authorize a court or jury to find that there has been a sub-

contract probably called for this work, but it was considered void, and the court say: "It may be quite true that it would not take long to do what remained to be done, and that what remained to be done was trifling, compared with the whole work of building an elegant residence; but it must be obvious that if the erection and completion of the house had been provided for in a valid contract, the contractor could not have successfully insisted on the day the lien was filed that he had complied with his contract, within the meaning of any of the qualifications or exceptions contained in the statute." And the court further said: "It is immaterial whether the oxidized hardware and tiling were in the written contract attempted to be made with S. & Son, or whether they were to be furnished by the owner or the contractor. If the use of these materials was necessary to the completion of the building, the purchase of them by the one party or the other could not affect the question whether the building was completed."

Colorado. The lack of completion of a mantel and fireplace required by the contract cannot be considered a trifling imperfection or omission from the work: Lichty v. Houston L. Co. (Colo.), 88 Pac. Rep. 846.

stantial performance, it must be found that he has such a structure. The court cannot say that anything is immaterial which the parties have made material by their contract. One has the right to determine for himself what he deems a good foundation, or what materials he desires to be used, and if he contracts for them, neither the contractor nor the court has the right to compel him to accept something else, which may be shown by the witnesses to be just as good or even better. No precise rule can or ought to be laid down upon this subject, but whenever such a case arises, courts and juries should see to it that the design of the owner shall not be defeated in any important respect.[76]

§ 344. **Same. Slight difference in value.** Although the difference between the value of the house as actually constructed and as it should have been constructed is only a small amount, this fact alone does not show that the contract has been substantially performed.[77] Thus the marble steps by which the basement of a building was to be reached was held to be a substantial portion of the building, rather than a trivial imperfection, even though its cost was small in comparison with the cost of the entire building.[78]

§ 345. **Same. Conveniences.** The conveniences called for in plans and specifications may be a material part of the building, and when so provided for, the building is not completed until the demands of the plans and specifications in this regard have been legally satisfied. So where an elevator is called for by the original plans and specifications, and the contract is let for its construction at the same time that other

[76] **Substantially in the language of the court** in Perry v. Quackenbush, 105 Cal. 299, 307, 310, 38 Pac. Rep. 740. See Marchant v. Hayes, 117 Cal. 669, 672, 49 Pac. Rep. 480. See Carpenter v. Ibbetson, 1 Cal. App. 272, 274, 81 Pac. Rep. 1114.

Idaho. Prospective profits as damages: See Harris v. Faris-Kesl Const. Co., 89 Pac. Rep. 760.

Washington. Measure of damages on prevention by owner: See Chase v. Smith, 35 Wash. 631, 77 Pac. Rep. 1069; and also Anderson v. Hilker, 38 Wash. 632, 80 Pac. Rep. 848.

[77] Perry v. Quackenbush, 105 Cal. 299, 307, 38 Pac. Rep. 740; Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

[78] Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

contracts are let, and it is attached to the building, and forms an integral part thereof, the building is not completed until the elevator is constructed, and the fact that the building might be used without it, and that it is a convenience merely, is immaterial.[79]

§ 346. Same. Erection of structure in part only. A building which is erected in part only will be held completed, for the purpose of filing liens, as provided in the statute,[80] when it distinctly appears that the original purpose of the owner to erect and build it in part only, or that the owner, having proceeded to erect the house in part, abandoned his design of finishing it.[81]

§ 347. Same. "Completion" of mining claim. It is evident that work upon a mine is continuous in its nature, and has no definite completion, but may run on for fifty years or more. The statute, therefore, cannot have reference to the work upon a mine as a thing to be completed. To hold otherwise would, in effect, be saying that the legislature was guilty of the absurdity of referring to the completion of a thing which has no necessary completion, but may go on indefinitely.[82]

§ 348. Statutory equivalents of completion for the purpose of filing claims of lien. Independently of the question of actual completion, discussed in the preceding sections, the

[79] Coss v. MacDonough, 111 Cal. 662, 666, 44 Pac. Rep. 325. See Schallert-Ganahl L. Co. v. Sheldon (Cal.), 32 Pac. Rep. 235.

[80] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[81] Schwartz v. Knight, 74 Cal. 432, 434, 16 Pac. Rep. 235; Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep. 840.

[82] California Powder Works v. Blue Tent Consol. H. G. Mines (Cal.), 22 Pac. Rep. 391.

Use of material or suspension of work on mine, it seems, is not to be treated as the completion referred to in **Kerr's Cyc. Code Civ. Proc.,** § 1187: California Powder Works v. Blue Tent Consol. H. G. Mines, supra.

"The liens cannot all date back to the commencement of the work. On a mine the work is always going on, and may have commenced before the laborers were born, and may continue indefinitely": Williams v. Mountaineer G. M. Co., 102 Cal. 134, 139, 34 Pac. Rep. 702, 36 Pac. Rep. 388.

See "Nature of Work," §§ 130 et seq., ante.

statute,[83] for certain purposes hereafter considered in detail, provides for certain equivalents of such completion. Such statutory equivalents may be summarized as: 1. Occupation, or use of the objects enumerated; 2. Acceptance thereof as completed; 3. Cessation from labor, (a) upon the contract, or (b) upon the object, for the statutory period.

§ 349. Same. Statutory provisions. The mechanic's-lien law[84] provides: "And in all cases the occupation or use of a building, improvement, or structure, by the owner, or his representative, or the acceptance by said owner or his agent, of said building, improvement, or structure, and cessation from labor for thirty days upon any contract or upon any building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter."[85]

§ 350. Same. Occupation and use. Scope and object of statutory provisions. The provision as to use, occupation, and acceptance, mentioned in the preceding section, has reference not only to a dwelling or other house, but to any kind of building or improvement. It seems that when the property is used and occupied so far as it is capable of being so used and occupied, it is sufficient, within the meaning of the

[83] **Kerr's Cyc. Code Civ. Proc., § 1187.**

[84] **Kerr's Cyc. Code Civ. Proc., § 1187.**

[85] **Previous to the amendment of 1897** making the provision as to use, occupation, or acceptance applicable "in all cases," the section provided for this rule "in case of contracts"; and under that provision it was held not to apply to void contracts, but only to valid statutory original contracts: Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 338, 31 Pac. Rep. 164; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 240, 29 Pac. Rep. 629; Giant Powder Co. v. San Diego F. Co., 97 Cal. 263, 265, 32 Pac. Rep. 172. But see Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896; Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 195, 20 Pac. Rep. 419.

This section, as amended in 1887, made such occupation, use, and acceptance "conclusive evidence" of completion: Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 195, 20 Pac. Rep. 419.

The amendment of 1897 makes either of them "equivalent" to completion. See "Evidence," §§ 792 et seq., post; "Filing Claims," §§ 416 et seq., post.

As to cessation from labor, the amendment of 1897 struck out the word "unfinished" before "contract" and "building," and thus broadened the provision.

statute. This provision was enacted in the interest of, and for the better protection of, lien claimants.[86]

One object of the provision is apparent; namely, that the owner and the contractor shall not, by a secret agreement between themselves, abandon the original contract before its completion, or dispense with the completion of the building according to its original plan, and thereby, by being able to show that the building has never been in fact completed, prevent the laborer and material-man from enforcing their liens.[87]

Another reason for the provision is found in the requirement — which fully protects the owner — that the owner shall retain twenty-five per cent of the contract price until the expiration of thirty-five days, as fixed in the contract, after its completion; and in order that the thirty days within which persons other than the contractor may file their claims of lien may commence with the thirty-five days, it was provided that his occupancy and use of the building should be conclusive evidence, before the amendment of 1897, of, and thereafter equivalent to, such completion. Such occupancy or use would, moreover, be as notorious a fact as, and be more readily established by the claimant than, the fact of actual completion.[88]

§ 351. Same. Character of occupation or use. The occupation or use, however, which, under the statute, is to be deemed "equivalent to" completion, under the amendment of 1897, must be open, notorious, and exclusive, and not of such a character as would be consistent with the continuance by the contractor in the completion of his contract, and whether in any particular case there has been such a completion or use must be determined from the facts of the case, as

[86] Giant Powder Co. v. San Diego F. Co., 88 Cal. 20, 23, 25 Pac. Rep. 976. See "Evidence," §§ 792 et seq., post.

[87] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 239, 29 Pac. Rep. 629.

[88] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 239, 29 Pac. Rep. 629.

The amendment of 1897 to § 1187, requiring the owner to file a notice of completion, also partially remedied this difficulty. See "Filing Lien," §§ 416 et seq., post; "Notice of Completion," §§ 425 et seq., post; "Cessation from Labor," §§ 354 et seq., post.

in the ordinary case must be determined the fact of actual completion. The owner must be shown to have acted towards the contractor and in reference to the building in such way as, by necessary implication, to give notice that the building had been accepted by him in satisfaction of the contract.[89] The continuance by the contractor in the work of completing his contract, while the building, or a portion thereof, is occupied by the owner, or used by him for the purposes for which it was intended, prevents such occupation or use from being regarded as conclusive evidence of completion.[90]

§ 352. Same. Void contract. Since the amendment of section eleven hundred and eighty-seven,[91] above referred to,[92] there is no distinction between valid and void contracts with respect to such occupation, use, and acceptance.[93] And although the statutory original contract may be void, the occupation of the building by the owner furnishes a test of completion of the work as against a claimant of a lien, when not explained, and is the equivalent of completion as against the owner, when necessary to sustain a lien filed upon the strength of the occupancy.[94] But the occupation of a structure, under a void contract, is not conclusive upon the question of completion.[95] When the statutory original contract was void, even before the amendment of 1897, an acceptance by the owner of the building as finished, under an agreement with the contractor and architect, and the taking possession

[89] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 239, 29 Pac. Rep. 629.

Acceptance by occupation of tenants: See Wyman v. Hooker, 2 Cal. App. 36, 39, 83 Pac. Rep. 79.

Washington. Acceptance by occupancy: See Windham v. Independent Tel. Co., 35 Wash. 166, 76 Pac. Rep. 936.

Payment in full and occupancy of house, held not to be an acceptance of the work, under the circumstances of the case: Ekstrand v. Barth, 41 Wash. 321, 83 Pac. Rep. 305.

[90] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 239, 29 Pac. Rep. 629 (dictum); before amendment of 1897.

[91] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[92] See note, § 349, ante.

[93] See note, § 349, ante.

[94] Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896, decided when § 1187 provided that such occupation, use, and acceptance shoud be conclusive evidence against the owner. See note 85, this chapter.

[95] Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, 32, 74 Pac. Rep. 357.

thereof, were not conclusive evidence of completion for the purpose of filing liens.[96]

§ 353. **Same. Acceptance. Waiver.** It has been seen that strict performance may be waived, or excused, independently of the statute.[97] The owner may waive compliance with conditions of the contract, such as the acceptance of the building by the architect before payment provided in the contract, and the exhibition of receipted bills and proof of non-existence of liens.[98]

Where owner consents to abandonment or rescission of the contract by the contractor before its completion, and he takes possession of the work and completes it, he "occupies, uses, and accepts" it, within the meaning of section eleven hundred and eighty-seven,[99] for the purpose of filing liens.[100] And such acceptance and occupation is such a completion for the purpose of filing liens, whatever may be the actual condition of the structure when work thereon ceased.[101]

[96] Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, 32, 74 Pac. Rep. 357.

[97] See Marchant v. Hayes, 117 Cal. 669, 672, 49 Pac. Rep. 840; Perry v. Quackenbush, 105 Cal. 299, 307, 38 Pac. Rep. 740.

See § 339, ante.

[98] Castagnino v. Balletta, 82 Cal. 250, 261, 23 Pac. Rep. 127.

[99] **Kerr's Cyc. Code Civ. Proc.,** § 1187, and note.

[100] Giant Powder Co. v. San Diego F. Co., 88 Cal. 20, 25, 25 Pac. Rep. 976. See Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 335, 31 Pac. Rep. 164 (void contract; before amendment of 1897).

See § 350, ante.

[101] Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 196, 20 Pac. Rep. 419.

But as to acceptance by agent being conclusive in absence of fraud or mistake, see Moore v. Kerr, 65 Cal. 519, 4 Pac. Rep. 542.

See § 350, ante.

When all the lumber is used, and only a few feet more are required to complete the work, and the owner informed his laborer, who was working by the day, that there was no more work for him to do, and that he would put in the remainder of the boards in the rear of the house, along the base below the floor, and there was about half a day's work to finish the painting, which was being done by the owner, and the laborer was thus discharged when the work was on the verge of full and actual completion, such discharge, under the circumstances, was an acceptance of the work as a completed contract for the erection of the building for the purpose of filing the lien: Ward v. Crane, 118 Cal. 676, 50 Pac. Rep. 839. See Lippert v. Lazar (Cal.), 33 Pac. Rep. 797; McIntyre v. Trautner, 63 Cal. 429, 430 (before amendment of 1887, where it was held that additional work done at the request of the owner of the building will be held to be a continuation of the work, and done under the same original contract).

See "Extra Work," §§ 243 et seq., ante.

§ 354. Same. Cessation from labor for thirty days. Statutory provision. The statute[102] provides: "And cessation from labor for thirty days upon any contract or upon any

Use by the owner of a temporary structure for the running of trains did not, under the circumstances of the case, furnish any evidence of the acceptance of a bridge as completed, the contract providing for the erection of such temporary structure: Stimson M. Co. v. Los Angeles T. Co., 141 Cal. 30, 32, 74 Pac. Rep. 357.

Acceptance of performance as to construction of ditch: See Gilliam v. Brown, 116 Cal. 454, 48 Pac. Rep. 486.

Montana. Mere occupancy of the building is not a waiver of defects, nor an acceptance, where acceptance is refused, as the owner is always in possession: Franklin v. Schultz, 23 Mont. 165, 57 Pac. Rep. 1037 (suit on express contract).

Oregon. Additional work: See Avery v. Butler, 30 Oreg. 287, 47 Pac. Rep. 706.

Delivery of keys to owner and his going into possession, with the agreement that he accepted the building, excepting certain alterations then agreed upon, which the contractor thereafter performed to the satisfaction of the architect, constitute, under the circumstances of the case, an acceptance of the work up to the list of alterations, and when such alterations were completed, it was a full acceptance of the building: Vanderhoof v. Sheli, 42 Oreg. 578, 72 Pac. Rep. 126, 128.

Utah. The mere acceptance of the building does not preclude the owner from showing that material was not furnished according to the agreement, when the defects were latent and appeared as seasoning progressed: Utah L. Co. v. James, 25 Utah 434, 71 Pac. Rep. 986.

[102] **Kerr's Cyc. Code Civ. Proc.,** § 1187 (as amended Stats. 1897, p. 202).

The provision as to cessation was first inserted in the section by the amendment of 1887, and applied to "any unfinished contract" or "any unfinished building," etc. It had been previously said by the court: "The owner of property on which a building has been commenced cannot deprive the material-man or laborer of his lien by refusing or omitting to finish the building. In Harmon v. Ashmead, 68 Cal. 321, 322, 9 Pac. Rep. 183, the complaint alleged that at the date of the commencement of the action the building had not been completed; that the defendant did not intend to complete it; and that he had notified the plaintiffs to that effect. The lien was decreed. The question is but incidentally referred to, but was included in the judgment recognizing and enforcing the lien of a material-man, in Germania v. Wagner, 61 Cal. 349. In that case, the building was not completed, 'but work thereon ceased July 16, 1881, and has never been resumed'": Schwartz v. Knight, 74 Cal. 432, 434, 16 Pac. Rep. 235, decided December 28, 1887, and relating to work done before the amendment of 1887, which went into effect March 15, 1887. There was no reference to the amendment in the decision. See Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep. 840, which also does not seem to notice the fact of the amendment, but follows the language of Schwartz v. Knight, supra.

See "Abandonment," §§ 358-360, post.

Cessation of work for thirty days: See McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850.

Colorado. Cessation of labor on an unfinished building is equivalent to a completion for the purpose of filing claims, under act of 1893, § 3: Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83, 86.

building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter."

§ 355. Same. Scope of provision. The statute makes cessation from labor for thirty days upon, 1. Any "contract," [103] as well as upon, 2. "Any building, improvement, or structure, or the alteration, addition to, or repair thereof," [104] — equivalent to the completion thereof, for all who are entitled to liens, as though the building were actually completed.

Cessation from work. Running of statute. While the broad language of the section is to the effect that cessation from work for thirty days shall be deemed equivalent to a completion thereof for all the purposes of the chapter on mechanics' liens, it is only a completion for the purpose of setting the time running within which to file claims of lien. It is not a completion of the structure or of the contract, as between the owner and the contractor, so that under a valid contract the owner would be liable to subclaimants as upon the completed contract and for the whole contract price. Such a construction of the law would work a monstrous injustice to the owner who had in all respects complied with the requirements of the law and of his contract, and who, notwithstanding such compliance, would be at the mercy of a defaulting contractor, who could thus pocket the partial payments specified in the contract, and, without paying for the material purchased and used in earning the instalments paid, enable the material-man who had contracted with him to be paid out of the instalments, to enforce payment from the owner, with whom he had no contractual relation.

[103] Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. Rep. 629.

[104] Willamette S. M. L. & M. Co. v. Los Angeles College Co., supra; Reed v. Norton, 90 Cal. 590, 600, 34 Pac. Rep. 333; Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 84, 24 Pac. Rep. 648; Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. Rep. 164; Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651; Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep 840.

The question of "trifling imperfection" is probably immaterial when the issue is as to cessation from work: Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 336, 31 Pac. Rep. 164. See § 349, ante.

See "Liability of Owner," §§ 523 et seq., post; "Filing Claim," §§ 416 et seq., post.

There is no such statutory completion for such purpose. There are several cases in the California reports where cessation of the work for thirty days is spoken of as a "completion." But this language is generally used in reference to the time within which claims of lien shall be filed. It is quite true that where claims of lien are filed because of a cessation of labor for thirty days, a suit may be maintained to foreclose the lien. But the statute plainly distinguishes between actual completion, and those cases where the contractor fails to perform his contract fully, or abandons the contract after part performance or before completion, so far as the rights of the subcontractor and the owner are concerned.[105]

§ 356. **Same. Character of cessation.** The words of the clause of the statute as to cessation from labor do not mean a mere clandestine stopping of actual work for thirty days, and then beginning it again without any indicia to the world that it had been stopped for thirty days. They were not contrived as a means of defrauding lien-holders. The cessation should certainly be of such character as to carry some charge of notice to a careful person. It has been said that whatever may be thought of the hardships which the present lien law sometimes imposes upon the owners of buildings, still, courts cannot undertake to break its force by refusing to apply to the rights of lien claimants the ordinary rules of evidence and the common principles of fair dealing.[106] And whether

[105] McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850. See Perry v. Quackenbush, 105 Cal. 299, 304, 38 Pac. Rep. 740.

The words, "shall be deemed equivalent to a completion," mean shall be equal, in legal effect, to a completion; that is, shall be treated, for the purpose of filing a claim of lien, as an actual completion: Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 84, 24 Pac. Rep. 648.

[106] Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 337, 338, 31 Pac. Rep. 164.

Where the claimant had notice of such cessation of labor upon the building for thirty days, it is a completion, as to him, for the purpose of filing his claim of lien: Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 82, 24 Pac. Rep. 648; Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 337, 338, 31 Pac. Rep. 164.

When, so far as appearances indicate to the claimant or to the world, the owner did not allow thirty days to go by at any one time without doing some work, and there is no reasonable ground for suspecting so, the building will not be considered completed for the purpose of filing liens: Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 337, 338, 31 Pac. Rep. 164.

there was such a cessation as is contemplated by the statute is a question of fact.[107]

§ 357. **Same. As affected by validity or invalidity of original contract.** The validity or invalidity of the original contract seems to be of great importance in respect to the time of filing the claim after cessation from work. Where the contract is valid, and the contractor gave to the owner written notice that he abandoned the contract, and that he declined to proceed further in its execution, and thereafter did no work upon the building, whereupon the owner contracted with another builder to complete the construction of the building, a cessation for thirty days upon the first contract is a statutory completion for the purpose of filing liens.[108]

The "contract" which is here referred to is the one between the owner and him who is termed the "original contractor," under and subject to the terms of which subclaimants must enforce their liens.[109]

If the original contract is valid, a cessation for thirty days from labor upon such contract is a statutory completion for the purpose of filing liens, whether work is resumed under some other contract, or by the owner himself, before or after thirty days from the beginning of such cessation.[110]

Colorado. Any labor performed before the building is actually completed, and which is in furtherance of its completion, whatever its character, would prevent such a "cessation" of labor for thirty days as would enable claimants to file claims, under § 2876, Mills's Ann. Stats.: Joralmon v. McPhee, 31 Colo. 26, sub nom. Joralman v. McPhee, 71 Pac. Rep. 419.

[107] Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 337, 31 Pac. Rep. 164.

[108] Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651.

Colorado. Where the time for the filing of a lien begins to run from the completion of the building, the lien may be filed at any time within the period after the completion of the building, even though the principal contractor had contracted to do only a part of the work upon the building, and the statute gives the claimant two months after the completion of improvement in which to file his statement, not two months from the completion of the contract under which he furnished the materials: Lichty v. Houston L. Co. (Colo.), 88 Pac. Rep. 846 (under Laws 1899, ch. cxviii, § 9, p. 271; the work was finished by another contractor).

[109] See Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. Rep. 629.

[110] Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651. See Green v. Clifford, 94 Cal. 49, 51, 29 Pac. Rep. 331.

Where the statutory original contract is void, there is no contract upon which there may be a cessation from labor;[111] and the cessation, if any, must be from labor upon "any building, improvement, or structure, or the alteration, addition to, or repair thereof." In such case, if there be a cessation from labor for thirty days, it would be such a statutory completion; but if, before the thirty days have expired, the owner continues the work, the claimant must look to some other subsequent completion, either actual or statutory, or to the filing of notice thereof, for the purpose of filing his lien.[112] And if the statutory original contract is void, subclaimants are not required to file their claims within thirty days from the cessation of labor by the contractor, but may file them within thirty days after the completion of the building.[113]

§ 358. Abandonment of original contract.[114] A clear distinction must be drawn between a cessation from labor discussed in the preceding section, even for the statutory period of thirty days, and an abandonment of the contract. There might be no intention to abandon a valid contract, and still there might be a cessation of labor for the statutory period;

[111] See §§ 286 et seq., ante.

[112] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 240, 29 Pac. Rep. 629. See Pierce v. Birkholm, 115 Cal. 657, 662, 47 Pac. Rep. 681.

See "Time of Filing Claim," §§ 416 et seq., post.

[113] Pierce v. Birkholm, 115 Cal. 657, 662, 47 Pac. Rep. 681.

[114] **Abandonment of contract to construct schoolhouse:** See Union S. M. Works v. Dodge, 129 Cal. 390, 393, 62 Pac. Rep. 41.

Abandonment under a non-statutory original contract: See Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

Liability of owner on abandonment, under valid statutory original contract: McDonald v. Hayes, 132 Cal. 490, 494, 64 Pac. Rep. 850.

See "Liability of Owner," §§ 523 et seq., post.

Abandonment of contract by contractor, rights of claimants in the fund: See Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262.

Abandonment by subcontractor: See Pohlman v. Wilcox, 146 Cal. 440, 80 Pac. Rep. 625.

As to abandonment, generally, see note 94 Am. St. Rep. 119.

As to right to lien when, without fault of the owner, the building is not completed, see note 43 Am. St. Rep. 900.

As to right to lien when improvement destroyed by fire before completion, see 2 Am. & Eng. Ann. Cas. 812.

Hawaii. Abandonment: See Pacific H. Co. v. Lincoln, 12 Hawn. 358, 359.

Washington. See Brodek v. Farnum, 11 Wash. 565, 40 Pac. Rep. 189.

and, on the other hand, there may be an intention to abandon and an actual abandonment by the contractor, without any cessation of labor on the building. Abandonment must also be distinguished from failure to carry out the contract strictly in accordance with its terms. Abandonment is inconsistent with a bona fide attempt to perform the contract.[115]

§ 359. Same. Owner's liability. Where there is a valid statutory original contract, it is the measure of the owner's liability; and where the contractor fails to perform such contract, the statute [116] provides the mode of determining the owner's liability.[117]

[115] Marchant v. Hayes, 120 Cal. 137, 49 Pac. Rep. 840. See Perry v. Quackenbush, 105 Cal. 299, 307, 38 Pac. Rep. 740.

See "Performance of Contract," §§ 334 et seq., ante.

Intent to abandon. In nearly all the cases reported, the cessation from labor was accompanied by an intent to abandon. See "Rights and Duties of the Owner," §§ 523 et seq., post.

Under a valid contract, it has been said that a finding that the original contractor "entirely ceased labor thereon without completing said building" is a fair definition of "abandonment": McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850; but this definition makes no allowance for intent.

Compare: Judson v. Malloy, 40 Cal. 299, and **Kerr's Cyc. Civ. Code,** note p. 1151.

Hawaii. Abandonment of work by the contractor, after payment in full for the proportion of the work then done, is not a bar to the enforcement of a lien for materials furnished by the subcontractor before the abandonment; but the case would be otherwise if the statute merely subrogated the subcontractor to the rights of the original contractor: Allen v. Redward, 10 Hawn. 151, 157.

Oklahoma. Failure to complete the structure within the contract time, there being a provision for damages for delay, is not an abandonment, and where the contract provides for notice in case of abandonment of the work, a mere breach of the contract does not require such notice: American S. Co. v. Scott (Okl.), 90 Pac. Rep. 7, 9.

Washington. See Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 624, 34 Pac. Rep. 774.

[116] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

Contractor's substantial performance of his undertaking, and an earning of the contract price, is contemplated in this statute: Hoffman-Marks Co. v. Spires (Cal., Aug. 8, 1908), 36 Cal. Dec. 120.

[117] McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850.

Abandonment by contractor. Owner's liability is limited to such portion of the contract price as represents the value of work already done; and where value of work done amounts to less than payments already made under the contract, there is nothing available for lien claimants, and they must look to the contractor: Hoffman-Marks Co. v. Spires, supra; C. Scheerer Co. (Inc.) v. Deming (Cal., Aug. 10, 1908), 36 Cal. Dec. 126. See McCune v. Jackman (Cal. App., March 16, 1908), 95 Pac. Rep. 673.

See §§ 315 et seq., ante.

Where the contractor abandons or fails to perform such a valid contract in full, it has been held that his subclaimants are not entitled, under section twelve hundred of the Code of Civil Procedure, to a lien to the full amount of the contract price remaining unpaid, irrespective of the cost of completion by the owner, although the owner did not proceed with such completion within thirty days after the contractor ceased work.[118]

The value of the work and materials done and furnished by the contractor, including materials upon the ground, estimated as near as may be by the standard of the whole contract price, and the reasonable cost of completing the building according to the original contract, if valid, it has likewise been held, are materal elements in determining the owner's liability.[119]

Upon abandonment of a non-statutory original contract, the liens of subclaimants cannot exceed the sum in the owner's hands due and unpaid to the contractor under the contract at the time of the abandonment.[120]

§ 360. **Same. Justification for abandonment.** There can be no rescission or abandonment of a contract by a party who has fully performed his part of it, and where the contract provides for the payment of instalments, a failure to pay one instalment when due does not give a right of action to recover the entire contract price, in the absence of a specific agreement to that effect.[121]

If the contractor has not performed the contract according to its terms at the time he demands payment of an instal-

[118] McDonald v. Hayes, 132 Cal. 490, 494, 64 Pac. Rep. 850.

[119] McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850.

In estimating work already done, it is proper to consider not only the value of the work completed at such time, but also the cost of doing that which is left undone, so that the whole may be compared with the contract price: Hoffman-Marks Co. v. Spires, supra; C. Scheerer Co. (Inc.) v. Deming (Cal., Aug. 10, 1908), 36 Cal. Dec. 126.

Final payment unavailable for lien claimants of original contractor, who abandons the contract, when such contractor has been paid in full for the work up to the time of the abandonment: Hoffman-Marks Co. v. Spires, supra; Raphael Co. v. Grote (Cal., Aug. 10, 1908), 36 Cal. Dec. 125; C. Scheerer Co. (Inc.) v. Deming, supra.

[120] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

[121] Flinn v. Mowry, 131 Cal. 481, 485, 63 Pac. Rep. 724, 1006.

ment, then it is not due, and he is not justified in leaving the work; and if he leaves the work without cause, it is an abandonment of the contract, as contemplated by the statute [122] providing for the liability of the owner upon abandonment of the valid contract by the contractor.[123]

If the owner has a proper claim for damages for breach of the contract, and the other party insists, as a condition to continuing the work, that the owner shall waive his claim for damages, this is a refusal to perform the contract.[124] But if the owner prevents the contractor from completing his contract, he is justified in abandoning it.[125]

The mere conveyance of the property during the progress of the work under the contract does not alone constitute an abandonment of the construction of the building by the owner, where it does not appear whether the grantee had or had not completed or abandoned the construction of the building.[126]

[122] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

See § 339, ante.

[123] Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635.

See "Liability of Owner," §§ 523 et seq., post.

Idaho. Facts justifying an abandonment of the contract: See Harris v. Faris-Kesl Const. Co. (Idaho), 89 Pac. Rep. 760, 762.

[124] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637, 638.

Oregon. Damages for delay, Sundays: Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126.

[125] Cox v. Western Pac. R. Co., 47 Cal. 87, 89; and see Cox v. McLaughlin, 54 Cal. 605, 606.

Excuse for non-performance: See, generally, note 18 Am. Dec. 452.

As to what constitutes prevention, see § 339, ante.

Washington. But not where the contractor was compelled by the owner to pay his debts due to other parties: De Mattos v. Jordan, 15 Wash. 378, 46 Pac. Rep. 402.

[126] Cohn v. Wright, 89 Cal. 86, 88, 26 Pac. Rep. 643.

Washington. After mutual rescission and abandonment of the original contract, the contractor is not obliged to complete the structure at the instance of the vendee of the owner, such vendee knowing the facts: Huetter v. Redhead, 31 Wash. 320, 71 Pac. Rep. 1016.

Abandonment of work on irrigation-ditch by consent: See Dyer v. Middle Kittitas Irr. Dist., 25 Wash. 80, 64 Pac. Rep. 1009, s. c. 40 Wash. 238, 82 Pac. Rep. 301.

CHAPTER XIX.

CLAIM OF LIEN. NATURE, NECESSITY, AND PURPOSE.

§ 361. Resemblance between statutory provisions as to claim of lien.
§ 362. Nature of claim of lien.
§ 363. Statutory provision. California.
§ 364. When claim of lien is necessary.
§ 365. Purpose of claim of lien.
§ 366. The necessity of one or more claims of lien.
§ 367. Same. Persons joining in same claim of lien.
§ 368. Same. Several objects and pieces of property.
§ 369. Same. Various items of labor or materials.

§ 361. Resemblance between statutory provisions as to claim of lien. The legislatures of the various states have adopted different methods of notifying [1] the owner of the claims for material and labor in the construction of the objects enumerated in the statutes, as well as for the perfecting of the inchoate lien.[2]

Claim of lien and notice of claim to owner. Distinction. The claim of lien required to be filed by the California statute [3] must be carefully distinguished from the notice of claim which may be given to the owner under another provision of the statute.[4] Many of the Western states have followed one or the other of these forms of notice to the owner, while some have enacted procedures substantially different. "Claim of lien" and "notice to owner" will be

[1] **See, generally, as to death of owner before filing claim,** note 43 Am. St. Rep. 778.

Notice to owner as a condition of lien: See note 11 L. R. A. 740.

Notice to be filed, and operation thereof: See note 13 L. R. A. 704.

Idaho. See, generally, under an early statute, Creer v. Cache V. C. Co., 4 Idaho 280, 38 Pac. Rep. 653, 95 Am. St. Rep. 63.

Utah. Publishing notice under § 1391, Rev. Stats. 1898: See Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605; Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360.

[2] **Colorado.** Before the claim of lien is filed, the lien is inchoate: Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 182. See §§ 9, 23, ante.

[3] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[4] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

See Jewell v. McKay, 82 Cal. 144, 149, 23 Pac. Rep. 139.

See "Notice to Owner," §§ 547 et seq., post.

here used to indicate the two forms of instruments, above mentioned, under the California statute. It is intended in this chapter to discuss the former only. The latter will be considered hereafter in detail.[5]

§ 362. **Nature of claim of lien.** A "lien"[6] is a charge imposed in some mode, other than by a transfer in trust upon specific property, by which it is made security for the performance of an act.[7] A mechanic's lien comes into existence by the filing of a proper "claim." The "claim of lien" is not the "lien"; neither is it the enforcement of the lien, nor any step in its enforcement; but the filing thereof is merely one of the acts to be performed in perfecting the lien.[8] If the claimant does not file a proper claim of lien

[5] See "Liability of Owner as Fixed by Notice," §§ 547 et seq., post.

[6] **The "notice of lien" and "lien"** are often spoken of in the decisions as if they were synonymous with the "claim of lien": See, for instance, Cox v. Western Pac. R. Co., 44 Cal. 18, 28; Silvester v. Coe Q. M. Co., 80 Cal. 510, 511, 22 Pac. Rep. 217. And see also **Kerr's Cyc. Pol. Code,** § 4236, subd. 16, and note.

[7] See **Kerr's Cyc. Civ. Code,** §§ 2872 et seq., and notes; **Kerr's Cyc. Code Civ. Proc.,** § 1180, and note.

See § 19, ante.

[8] Corbett v. Chambers, 109 Cal. 178, 183, 41 Pac. Rep. 873; Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41. See Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681, 683; Boscow v. Patton, 136 Cal. 90, 68 Pac. Rep. 490.

Colorado. See Schradsky v. Dunklee, 9 Colo. App. 394, 398, 48 Pac. Rep. 666.

Hawaii. Lucas v. Redward, 9 Hawn. 23, 25.

Montana. See McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428 (under § 2131, Code Civ. Proc.).

New Mexico. See Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284, 286.

Nevada. But see Sabin v. Connor, 21 Fed. Cas. 124.

Oregon. See Horn v. United States M. Co. (Oreg.), 81 Pac. Rep. 1009. But see notice and statement under act of 1874: Whittier v. Blakely, 13 Oreg. 546, 11 Pac. Rep. 305; and see In re Coulter, 2 Sawy. C. C. 42, 6 Fed. Cas., p. 637, 6 N. B. R. 64, 1 Am. L. T. Rep. Bankr. 257, 3 Chic. Leg. News, 377, 4 Am. Law T. 131.

Utah. The doctrine as construed under the act of 1890 in this state differs from that generally held, the court saying, "Every person claiming a lien must file the statement as provided in this section (§ 10). This is indispensable to preserve the lien provided for in the preceding sections. . . . It is evident that the filing of the statement does not create the lien, . . . but simply holds it or keeps it in force for the time of one year, . . . so as to give the claimant an opportunity to enforce the same by process of law": Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238. But see Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 359, 34 Pac. Rep. 368.

See § 364, post.

within the time and in the manner prescribed by law, he has no lien upon the property, whatever other remedy he may have.[9]

§ 363. Statutory provision. California. The California statute provides:[10] "[A] Every original contractor, [1] at any time after the completion of his contract, and [2] until the expiration of sixty days after the filing of said notice of completion or notice of cessation of labor by the owner,[11] and [B] every person, save the original contractor, claiming the benefit of this chapter, [1] at any time after the completion of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, and [2] until the expiration of thirty days after the filing of said notice of completion or cessation, by said owner, or [3] within thirty days after the performance of any labor in a mining claim, must

The statement of intention to perform labor or furnish material under § 12 of the same act is permissive: Morrison v. Carey-Lombard Co., supra.

Washington. Laws 1893, p. 33, § 5 (Ballinger's Ann. Codes, § 5904): "No lien created by this act shall exist, . . . unless within ninety days . . . a claim for such lien shall be filed," etc.: See Nason v. Northwestern M. & P. Co., 17 Wash. 142, 146, 49 Pac. Rep. 235; Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. Rep. 273; United States S. L. & B. Co. v. Jones, 9 Wash. 434, 440, 37 Pac. Rep. 666; Johnston v. Harrington, 5 Wash. 73, 79, 31 Pac. Rep. 316; Gates v. Brown, 1 Wash. 470, 474, 25 Pac. Rep. 914; Cowie v. Ahrenstedt, 1 Wash. 416, 418, 25 Pac. Rep. 458.

[9] Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 627, 16 Pac. Rep. 516; Santa Clara V. M. & L. Co. v. Williams (Cal.), 31 Pac. Rep. 1128. See Boscow v. Patton, 136 Cal. 90, 68 Pac. Rep. 490.

See "Cumulative Remedies," § 638.

As to right to enforce mechanic's lien and pursue other remedy, see note 3 Am. & Eng. Ann. Cas. 1100.

Colorado. See Schradsky v. Dunklee, 9 Colo. App. 394, 48 Pac. Rep. 666.

Under act of 1889, the failure to file the statement within the time prescribed did not defeat the lien, except as against innocent purchasers and encumbrancers: Marean v. Stanley, 5 Colo. App. 335.

Oregon. Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 96, 75 Am. St. Rep. 574; Rankin v. Malarkey, 23 Oreg. 593, 32 Pac. Rep. 620, 34 Id. 816.

Utah. But see Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238 (1890).

Washington. United States S. L. & B. Co. v. Jones, 9 Wash. 434, 440, 37 Pac. Rep. 666; Alexander v. Hemrich, 4 Wash. 727, 31 Pac. Rep. 21.

[10] **Kerr's Cyc. Code Civ. Proc.,** § 1187, as amended Stats. 1897, p. 202. For other statutes, see Table of Correlated Statutes, at front of volume.

[11] **Notice of completion:** See §§ 425 et seq., post.

file for record with the county recorder of the county, or city and county, in which such property or some part thereof is situated, a claim containing [a] a statement of his demand, [b] after deducting all just credits and offsets, [c] with the name of the owner or reputed owner, if known, and [d] also the name of the person by whom he was employed, or to whom he furnished the materials, [e] with a statement of the terms, time given, and conditions of his contract, and [f] also a description of the property to be charged with the lien, sufficient for identification, which claim must be [g] verified by the oath of himself or of some other person; provided, however, that in any event [4] all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof."

§ 364. **When claim of lien is necessary.** A claim of lien is required to perfect the lien in the case of work upon structures [12] mentioned in section eleven hundred and eighty-three,[13] and materials furnished to be used in the construction, alteration, addition to, and repair thereof; [14] and, by the express language of section eleven hundred and eighty-seven,[15] in the case of "the performance of any labor in a mining claim." [16]

In case of furnishing materials for work in mining claim, it has been generally assumed that it is necessary to file a claim of lien, apparently under the broad provision of sec-

[12] See "Nature of Labor," §§ 130 et seq., ante; "Object," §§ 166 et seq., ante.

[13] **Kerr's Cyc. Code Civ. Proc.,** § 1183, and note.

[14] See §§ 144 et seq., ante.

[15] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

Utah. Under act of 1890, it seems that the claim of lien is not necessary "to create" the lien, but simply to "preserve" it; the lien being created when the labor is performed or materials are furnished, although it is also said that upon the filing of the statement provided for in § 11 the lien is "completed." This language is not very clear or satisfactory: Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238. But see Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 359, 34 Pac. Rep. 368.

See § 362, ante.

Washington. The fact that the contract is made with the owner does not any the less require a compliance with the statute as to filing the claim: United States S. L. & Bldg. Co. v. Jones, 9 Wash. 434, 440, 37 Pac. Rep. 666.

[16] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

tion eleven hundred and eighty-seven,[17] that "every person, save the original contractor, claiming the benefit of this chapter . . . must file for record . . . a claim," etc., although there is no express provision in the statute for the time within which such claim must be filed for record. Although the statute[18] quoted in the preceding section apparently refers to the objects enumerated in the first clause of section eleven hundred and eighty-three,[19] namely, "structures," and in the second clause, namely, "in a mining claim," or in or upon any real property worked as a mine,[20] yet it is thought that the requirement as to filing the claim of lien is applicable in the case of work under section eleven hundred and ninety-one,[21] relating to work on streets, etc., in incorporated cities.[22]

Fact that the statutory original contract is verbal, and therefore void, does not relieve the claimant from compliance with the provisions of section eleven hundred and eighty-seven,[23] the court saying, "That section declares that 'every person' seeking the benefits of that chapter must state in his claim of lien all of the facts therein specified."[24]

Necessity for claim of lien. It has therefore been held, either expressly or impliedly, that in all cases mentioned in the chapter relating to liens of mechanics and others upon real property,[25] it is necessary, in order that a lien may be

[17] See "Time of Filing Claim," § 422, post; California P. W. v. Blue Tent Consol. H. G. Mines Co. (Cal.), 22 Pac. Rep. 391. The question as to whether or not it was necessary to file a claim at all was not raised, but the issue as to the time of filing seems impliedly to cover the point.

[18] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[19] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[20] See § 184, ante.

[21] **Kerr's Cyc. Code Civ. Proc.,** § 1191.

[22] Beatty v. Mills, 113 Cal. 312, 313, 45 Pac. Rep. 468 (in this case it was assumed that a claim of lien must be filed, and the issue was as to the time of filing); Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986.

See "Time of Filing Claim," § 422, post.

Oregon. All the provisions of §§ 3669-3682, Hill's Ann. Laws, are applicable to grading, etc., under § 3676, Id.: Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305.

[23] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[24] Madera F. & T. Co. v. Kendall, 120 Cal. 182, 184, 52 Pac. Rep. 304, 65 Am. St. Rep. 117, **citing** Davis v. MacDonough, 109 Cal. 547, 42 Pac. Rep. 450.

[25] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1203a.

perfected, to file such a claim; but no claim of lien need be filed to perfect a cause of action in personam against an employer after giving the notice to him provided by section eleven hundred and eighty-four [26] to intercept moneys in his hands due the contractor.[27]

§ 365. Purpose of claim of lien. Under previous statutes of California,[28] notice to the owner, similar to that provided for in section eleven hundred and eighty-four [29] was required. The main object of giving personal notice by the claim to the owner of the building is to affect him with notice of the lien, and afford him an opportunity to protect himself against the same in his dealings with the original contractor and others;[30] and this is likewise one of the objects of filing the claim of lien for record, to give notice of the lien to those interested, or about to become interested, in the property upon which it is claimed, and for the protection of those who may deal with the owner of the property.[31]

Purpose of such record is also to inform owner, in case of contractor and laborers rendering services under such

[26] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[27] **Kerr's Cyc. Code Civ. Proc.,** § 1184; First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45; Bates v. Santa Barbara Co., 90 Cal. 543, 547, 27 Pac. Rep. 438.

No claim was required to be filed under the act of March 31, 1891, giving a lien to certain laborers of corporations: Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 631, 43 Pac. Rep. 14; Kuschel v. Hunter (Cal.), 50 Pac. Rep. 397. This act was, however, declared unconstitutional. See §§ 28 et seq., ante.

Colorado. Statement essential to perfect lien under act of 1883, as amended in 1889: Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 210, 50 Pac. Rep. 744.

[28] Stats. 1850, p. 212, § 2; Stats. 1855, p. 157, § 3; Stats. 1858, p. 225; Stats. 1862, p. 385, § 5.

[29] **Kerr's Cyc. Code Civ. Proc.,** § 1184. See "Notice to Owner," §§ 547 et seq., post.

[30] Corbett v. Chambers, 109 Cal. 178, 181, 182, 41 Pac. Rep. 873.

Utah. Filing claim before furnishing labor or material, simply an additional safeguard, under § 1338 of the Revised Statutes: Morrison v. Carey-Lombard L. Co., 9 Utah 70, 33 Pac. Rep. 238 (1890).

Washington. Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001.

Wyoming. Wyman v. Quayle, 9 Wyo. 326, 63 Pac. Rep. 988.

[31] Corbett v. Chambers, 109 Cal. 178, 181, 182, 41 Pac. Rep. 873; Union L. Co. v. Simon (Cal. App. and Sup.), 89 Pac. Rep. 1077, 1078, 1081.

Montana. Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 416.

Oregon. Osborn v. Logus, 28 Oreg. 302, 310, 37 Pac. Rep. 456, 38 Id. 190, 42 Id. 997.

contract, as to the extent and nature of the lien-holders' claims, to facilitate investigation as to their merits;[32] and the scheme as a whole, as well as its details, indicates the purpose of the law-makers, that the rights of subcontractors and subclaimants shall be ascertained by reference to the claim of lien as filed, or shall rest upon proof of contracts between them and the original contractor, such as accord with the terms and conditions set forth in such claims of liens.[33]

Its purpose is to inform claimants also, it seems, as to their probable rights in the property, and to enable them to learn the names of persons who have claims, so as to make them parties to the suit to foreclose the lien, in order that the rights of all persons interested in the fund may be determined.[34]

Independently of any such purpose, however, it is essential to the perfection of the lien.[35]

§ 366. The necessity of one or more claims of lien. Whether, in a particular instance, it is necessary to file one or more claims of lien depends upon the statute, and upon the circumstances of the case. The fact that a number of claimants have demands against the same property, or that the work or material has been done or furnished for several structures, or that they consist of a variety of items, is a

Washington. And also to give notice of all the facts upon which it is based: McHugh v. Slack, 11 Wash. 370, 372, 39 Pac. Rep. 674. See Washington R. P. Co. v. Johnson, 10 Wash. 445, 447, 39 Pac. Rep. 115; Whittier v. Stetson & P. M. Co., 6 Wash. 190, 195, 33 Pac. Rep. 393, 36 Am. St. Rep. 149.

Wyoming. Wyman v. Quayle, 9 Wyo. 326, 63 Pac. Rep. 988.

[32] Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 381, 51 Pac. Rep. 555; McGinty v. Morgan, 122 Cal. 103, 54 Pac. Rep. 392.

Montana. Richards v. Lewisohn, 19 Mont. 128, 131, 47 Pac. Rep. 645.

Utah. Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

Washington. Collins v. Snoke, 9 Wash. 566, 570, 38 Pac. Rep. 161. See United States S. L. & B. Co. v. Jones, 9 Wash. 434, 440, 37 Pac. Rep. 666.

[33] Goss v. Strelitz, 54 Cal. 640, 643.

Nevada. Lonkey v. Wells, 16 Nev. 271.

Utah. Morrison M. & Co. v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[34] See "Filing Claim," §§ 416 et seq., post; "Parties Plaintiff," §§ 659 et seq., post.

[35] See § 362, ante.

matter affecting the determination of the question. A statute may allow a lien on two or more pieces of land, and may permit of two or more descriptions in the claim of lien, and allow a number of claimants to join as parties plaintiff in the same action; but it is evident that these latter matters are not necessarily involved in the question as to how many claims of lien must be filed in the particular instance to satisfy the statute.[36]

§ 367. **Same. Persons joining in same claim of lien.** With reference to the persons[37] who may join in one claim of lien, as distinguished from the enforcement of several liens in a joint action to foreclose the same, under provisions of the statute,[38] it is to be observed that the question has not been decided in California.[39]

A separate claim of lien is not required because of a change of ownership, nor because of mortgages executed by a new owner to the former owners.[40]

[36] See "Two or More Descriptions," § 406, post; "Parties Plaintiff," §§ 659 et seq.; "Territorial Extent of Lien," §§ 438 et seq., post.

Oregon. Where separate contracts were made by a subcontractor with the original contractor for the construction of two different houses, the claimant was held justified in filing separate claims of lien: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708, 75 Id. 710.

As to liens where contract involves construction of buildings on separate lots, see note 2 Am. & Eng. Ann. Cas. 685-687.

[37] See "Parties Plaintiff," §§ 659 et seq., post; "Partners," § 44, ante.

[38] **Kerr's Cyc. Code Civ. Proc.,** § 1195, and note.

[39] **Kerr's Cyc. Code Civ. Proc.,** § 1187, which provides for the filing of such claims, seems to indicate the filing of separate claims by several claimants; but see par. "Washington," infra, this note.

Nevada. Under Stats. 1871, p. 123, it was held that there was no provision for filing a joint claim, where there was no community of interest: Skyrme v. Occidental M. & M. Co., 8 Nev. 219. But it did not prevent the subsequent filing of valid individual claims: Id.

Washington. Any number of claimants may join in the same claim (under § 5904, Ballinger's Ann. Codes): Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 316, 39 Pac. Rep. 815.

Under an earlier statute, which contained a provision similar to § 1195, **Kerr's Cyc. Code Civ. Proc.,** allowing claimants to join as plaintiffs in the same action, it was said that if they could do this, there was no reason why they might not as well join in a claim of lien, as expense was thereby saved, where the character of the claims is the same and the same property is being proceeded against, each claim being stated separately; although it has been held by some courts that the right to join in a claim of lien must come from the statute: Chevret v. Mechanics' M. & L. Co., 4 Wash. 721, 31 Pac. Rep. 24.

[40] Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41.

As to priorities between mechanics' liens and mortgages, see note 7 Am. & Eng. Ann. Cas. 624.

See §§ 166 et seq., ante.

§ 368. Same. Several objects and pieces of property. With reference to the property, and object upon which the work is done,[41] one claim may be filed against two buildings erected at the same time and under one contract.[42]

Materials used elsewhere than in improvement on which lien claimed. Where an unspecified and indeterminable portion of the materials mentioned in the claim of lien was furnished to the owner for property other than that against which the claim is filed, and was used thereon, which property was not involved in the suit, and these items cannot be

[41] **Right to file a mechanic's lien against several buildings:** See note 17 L. R. A. 314; also 2 Am. & Eng. Ann. Cas. 947.

[42] Booth v. Pendola, 88 Cal. 36, 40, 25 Pac. Rep. 1101, 24 Id. 714.

See "Two Descriptions," § 406, post; "Extent of Lien," §§ 438 et seq., post.

As to separate buildings on non-contiguous lots, see 2 Am. & Eng. Ann. Cas. 685.

Colorado. Small v. Foley, 8 Colo. App. 435, 440, 47 Pac. Rep. 64.

Montana. See Smallhouse v. Kentucky & M. G. & S. M. Co., 2 Mont. 443.

Occasional repairs, if subsequently made, cannot be added to the work performed in the erection of a building months before, so as to render the whole work one continuous performance, for which a single lien can be claimed within the statutory time after the last repairs: Davis v. Alvord, 94 U. S. 445, 448, bk. 24 L. ed. 283. See Alvord v. Hendrie, 2 Mont. 115.

Oregon. Willamette S. M. L. & M. Co. v. Shea, 24 Oreg. 40, 32 Pac. Rep. 759 (the test being the entirety of the contract, although the statute — Hill's Code, §§ 3669, 3670, 3673 — uses the words "building" and "land" in the singular, — a well-considered case); but it is otherwise where the contract is not entire and the structures are not on the same tract of land (Id.): The Dalles L. & M. Co. v. Wasco W. M. Co., 3 Oreg. 527; Kezartee v. Marks, 15 Oreg. 529, 16 Pac. Rep. 407.

The first case reverses the reasoning of the case last cited. See also Willamette Falls T. & M. Co. v. Remick, 1 Oreg. 169, 170.

See note 2 Am. & Eng. Ann. Cas. 685.

Separate claims were upheld under separate contracts for the construction of two houses, under the circumstances of the case: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708, 75 Pac. Rep. 710.

Utah. Provided that the claim designates the amount due on each building: Eccles L. Co. v. Martin, 87 Pac. Rep. 713, 718.

But see "Priorities Inter Sese," §§ 504 et seq., post.

Washington. Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001 (under Ballinger's Ann. Codes and Stats., § 5907).

Washington. And this may be done without specifying the particular house for which the materials were furnished, where they were used indiscriminately, there being no intervening rights: Wheeler v. Ralph, 4 Wash. 617, 629, 30 Pac. Rep. 709. See Merchant v. Humeston, 2 Wash. Ter. 433, 7 Pac. Rep. 903; Sullivan v. Treen, 13 Wash. 261, 43 Pac. Rep. 38; and see § 406, post. But see Heald v. Hodder, 5 Wash. 677, 32 Pac. Rep. 728; and Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720 (the claim showing the amount due on each house).

segregated from the general aggregate, the claim is fatally defective.[43] But a claim for materials was held not objectionable because it included items for materials used in building an adjacent sidewalk, which, under the circumstances of the case, was considered a part of the building.[44]

§ 369. **Same. Various items of labor or materials.** As to the items of labor, neither the contractor nor a subcontractor can, from time to time, as the work progresses, file successive claims of lien for work done under an entire contract for the different items of labor or material; since in such case but one lien can be acquired.[45] So where a section of a railroad is graded under an entire contract, the contractor is entitled to one lien to be filed upon the whole work, and he cannot foreclose a lien filed before the completion of the work on a portion of the road, because he was prevented from completing the contract.[46]

Material-men should not file separate claims for materials furnished under different contracts for a structure; all the materials furnished should be included in one claim.[47]

[43] McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622.

[44] McClain v. Hutton, 131 Cal. 132, 136, 63 Pac. Rep. 182, **modifying s.** c. 61 Pac. Rep. 273.

[45] Cox v. Western Pac. R. Co., 44 Cal. 18, 28; Silvester v. Coe Q. M. Co., 80 Cal. 510, 512, 22 Pac. Rep. 217; Pacific R. M. Co. v. Bear V. Irr. Co., 120 Cal. 94, 98, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

Oregon. See Willamette S. M. L. & M. Co. v. Shea, 24 Oreg. 40 32 Pac. Rep. 759.

[46] Cox v. Western Pac. R. Co., 47 Cal. 87, 89.

As to employment in mine by the month, see Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772.

See "Time of Filing," § 422, post.

As to application of mechanics' liens to railroads, see 7 Am. & Eng. Ann. Cas. 269-272.

Nevada. Capron v. Strout, 11 Nev. 304; Skyrme v. Occidental M. & M. Co., 8 Nev. 219.

[47] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 236, 39 Pac. Rep. 758.

Montana. But where a party performs labor for another, in a case where he would be entitled to a lien for one part of his labor, and not for the remainder, he may properly charge for his labor under two different accounts: Christnot v. Montana G. & S. M. Co., 1 Mont. 44.

See note 2 Am. & Eng. Ann. Cas. 689.

CHAPTER XX.

CLAIM OF LIEN (CONTINUED). CONTENTS OF CLAIM.

§ 370. General statement as to contents of claim of lien.
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§ 395. Same. Nature of labor.
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§ 408. Claim of charge.
§ 409. Signature.
§ 410. Verification.
§ 411. Uncertainty in claim.
§ 412. Mistake and error in claim.
§ 413. Same. Unnecessary statements.
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§ 415. Amendment of claim.

§ 370. General statement as to contents of claim of lien. The claim of lien must contain a correct statement of the facts required by the statute,[1] and unless the claim is so stated, no lien can be enforced.[2] The California statute [3] merely defines the classes which are entitled to the liens therein provided for, and does not purport to prescribe the contents of the claim to a lien which is to be filed. What

[1] **General statutory requirements** held sufficient:

Alaska. See Jorgensen v. Sheldon, 2 Alas. 607, 609 (under Code, § 266).

Idaho. See Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218 (under Sess. Laws 1899, p. 148, § 6).

New Mexico. See Pearce v. Albright, 76 Pac. Rep. 286.

Oklahoma. See Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

Utah. See Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008 (under Sess. Laws 1890, ch. xxx).

Washington. See Fitch v. Applegate, 24 Wash. 25, 31, 64 Pac. Rep. 147 (on saw-mills, etc., under act of March 6, 1897).

[2] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 380, 51 Pac. Rep. 555; Madera F. & T. Co. v. Kendall, 120 Cal. 182, 184, 52 Pac. Rep. 304, 65 Am. St. Rep. 117.

See "Variance," §§ 835 et seq., post.

New Mexico. "No particular form of statement is required. All that is necessary is that the language used in the statement shall convey and express in an intelligent manner the meaning and intent of the statute": Ford v. Springer L. Assoc., 8 N. M. 37, 50, 41 Pac. Rep. 541; Minor v. Marshall, 6 N. M. 194, 199, 27 Pac. Rep. 481.

Oregon. Williams v. Toledo C. Co., 25 Oreg. 426, 36 Pac. Rep. 159, 42 Am. St. Rep. 799.

Whatever the statute makes necessary to the existence of the lien must be complied with, in order to obtain the benefit of its provisions. The court cannot, by construction, dispense with any of the requirements of the statute; and one who claims the benefit of its provisions must show a clear compliance with the terms of the statute: Gordon v. Deal, 23 Oreg. 153, 31 Pac. Rep. 287, **citing** Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305; Rankin v. Malarkey, 23 Oreg. 593, 32 Pac. Rep. 620, 34 Id. 816.

Utah. Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

Washington. McHugh v. Slack, 11 Wash. 370, 372, 39 Pac. Rep. 674.

[3] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

the claim must contain is prescribed by another section of the code,[4] and nothing is required to be stated which is not set forth in the provisions of the statute as to such claim of lien.[5]

Such claims are often made out on a blank form by the claimant, or some friend or person not versed in the law, and are surrounded with sufficient difficulties and obstacles by requiring that the statute be substantially complied with, without imposing terms and conditions not required by the statute.[6]

Statement of claim need not contain all the facts. It is not required, therefore, that the claim shall contain a statement of all the facts essential to establish the lien;[7] whether, for

[4] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[5] Jewell v. McKay, 82 Cal. 144, 146, 150, 23 Pac. Rep. 139; Corbett v. Chambers, 109 Cal. 178, 180, 41 Pac. Rep. 873; Slight v. Patton, 96 Cal. 384, 386, 31 Pac. Rep. 248. See §§ 362 et seq., ante.

Twofold character of claim to lien. It is said in Union L. Co. v. Simon (Cal. App.), 89 Pac. Rep. 1077, 1078, that claim has a twofold character. "It must contain a statement of the facts which the statute prescribes for the creation of the lien," and it must contain a description of the property to be charged with the lien. This statement is certainly not in line with the authorities.

Colorado. The claim must contain all that the law requires, but it need not contain more: Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 181.

New Mexico. See Post v. Miles, 7 N. M. 317, 325, 34 Pac. Rep. 586

Oregon. Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Id. 54 (under Hill's Code, § 3669). See Osborn v. Logus, 28 Oreg. 302, 319, 38 Pac. Rep. 190, 42 Id. 997; Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 96, 75 Am. St. Rep. 574.

When claim contains all facts required by statute, the question as to whether the claimant's demand will in fact support the lien is a matter of allegation and proof: Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 42 Id. 997 (under Hill's Code, § 3669).

Utah. Brubaker v. Bennett, 19 Utah 401, 57 Pac. Rep. 170.

Washington. But see McHugh v. Slack, 11 Wash. 370, 372, 39 Pac. Rep. 674.

[6] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74.

[7] Corbett v. Chambers, 109 Cal. 178, 183, 41 Pac. Rep. 873; Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74; Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41.

Washington. Contra: See Heald v. Hodder, 5 Wash. 677, 32 Pac. Rep. 728 (which held, under the statute then in force, that the claim should set forth sufficient to show prima facie that the lien can be enforced, and to enable a searcher of titles to ascertain therefrom whether or not the facts exist which will warrant the enforcement of the lien); Johnston v. Harrington, 5 Wash. 73, 80, 31 Pac. Rep. 316 (where it was held to be necessary to state the time of furnishing the last materials; and the statement in the notice of lien, that "the

instance, the facts being truly stated, as required by the statute, the person in possession of the property or the person by whom the laborer was employed had authority to bind the owner, as agent, is a matter for allegation and proof at the trial.[8]

Contents of notice to owner, allowed by the statute,[9] are not necessarily those required in the claim of lien which is to be filed with the recorder.[10]

§ 371. **Construction of claims. General principles.** It is intended here to consider only the general principles of the construction of claims of lien, leaving specific instances of construction to various subheads subsequent.[11] The claim must be construed as a whole, and even the verification will be considered in connection with the other matter contained in the claim.[12]

Substantial compliance. Liberal construction. A substantial compliance with the statute as to the claim of lien is all that is required.[13] It has been said that the provisions of

lien claim is filed within thirty days from the date of ceasing to furnish said materials," would alone be sufficient). See also Tacoma L. & Mfg. Co. v. Kennedy, 4 Wash. 305, 30 Pac. Rpe. 79; Warren v. Quade, 3 Wash. 750, 29 Pac. Dep. 827.

[8] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74.

[9] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[10] Jewell v. McKay, 82 Cal. 144, 149, 23 Pac. Rep. 139.

As to contents of notice to owner, under § 1184, **Kerr's Cyc. Code Civ. Proc.,** see "Purpose of Claim," § 365, ante; "Notice," §§ 547 et seq., post.

[11] See Newell v. Brill, 2 Cal. App. 61, 63, 83 Pac. Rep. 76.

See also § 29, ante, and § 411, post.

Colorado. See Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107.

[12] See Jones v. Kruse, 138 Cal. 613, 617, 72 Pac. Rep. 146; and see Newell v. Brill, 2 Cal. App. 61, 63, 83 Pac. Rep. 76.

See § 410, post.

Washington. The claim must be construed as a whole: Sautter v. McDonald, 12 Wash. 27, 30, 40 Pac. Rep. 418.

[13] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74; Wood v. Wrede, 46 Cal. 637, 638 (employer); Hooper v. Flood, 54 Cal. 218, 221 (name of owner or reputed owner, and terms, time given, and conditions of contract); Blackman v. Mariscano, 61 Cal. 638, 640 (terms, time given, and conditions of contract); Tredinnick v. Red Cloud Consol. M. Co., 72 Cal. 78, 80, 13 Pac. Rep. 152 (terms, time given, and conditions of contract; the court even saying, in this case, that the claim should be liberally construed); Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195 (terms of contract); Hagman v. Williams, 88 Cal. 146, 151, 25 Pac. Rep. 1111; Russ L. & M. Co. v. Garrett-

the code relative thereto are to be liberally construed, with a view to effect their objects and to promote justice;[14] and

son, 87 Cal. 589, 595, 25 Pac. Rep. 747; Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072 (terms of contract; payment); Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 339 (names of owner and reputed owner, and person to whom materials were furnished); Rauer v. Fay, 40 Cal. 361, 42 Pac. Rep. 902. See California P. W. v. Blue Tent Consol. H. G. M. Co. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391 (terms, time given, and conditions of contract); Harmon v. Ashmead, 68 Cal. 321, 324, 9 Pac. Rep. 183.

Alaska. Jorgensen Co. v. Sheldon, 2 Alas. 607, 610; Russell v. Hayner, 2 Alas. 702 (dig.), 130 Fed. Rep. 90, 64 C. C. A. 424.

Colorado. Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456.

Statute must be strictly pursued; and to create the lien, the provisions must be specifically and accurately followed: Rice v. Carmichael, 4 Colo. App. 84, 34 Pac. Rep. 1010; Harris v. Harris, 9 Colo. App. 211, 219, 47 Pac. Rep. 841.

Montana. McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428 (holding that in so far as the granting of the lien is concerned, the statute is remedial in character, and should be liberally construed, but in so far as the procedure is concerned by which the lien is claimed and enforced, the statute should be strictly followed; but this decision is against the weight of authority). See also Yerrick v. Higgins, 22 Mont. 502, 57 Pac. Rep. 95, 98.

Nevada. Maynard v. Ivey, 21 Nev. 241, 245, 29 Pac. Rep. 1090; Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. Rep. 50; Skyrme v. Occidental M. & M. Co., 8 Nev. 219.

New Mexico. Ford v. Springer L. Assoc., 8 N. M. 37, 47, 41 Pac. Rep. 541, **affirmed** 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170; Post v. Miles, 7 N. M. 317, 323, 34 Pac. Rep. 586.

Oklahoma. Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

Oregon. Osborn v. Logus, 28 Oreg. 302, 319, 38 Pac. Rep. 190, 42 Pac. Rep. 997; Rankin v. Malarkey, 23 Oreg. 593, 597, 32 Pac. Rep. 620, 34 Pac. Rep. 816; Gordon v. Deal, 23 Oreg. 153, 155, 31 Pac. Rep. 287; Pilz v. Killingsworth, 20 Oreg. 432, 435, 26 Pac. Rep. 305; Allen v. Rowe, 19 Oreg. 188, 190, 23 Pac. Rep. 901; Williams v. Toledo C. Co., 25 Oreg. 426, 431, 36 Pac. Rep. 159, 42 Am. St. Rep. 799.

Claim filed must show what. While the act relating to mechanics' liens should be liberally construed, it is essential to the validity of the lien that the claim filed shall show upon its face a substantial compliance with the provisions of the law, and none of the essential requirements of the statute can be dispensed with: Nicolai Bros. Co. v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288.

Utah. Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[14] Newell v. Brill, 2 Cal. App. 61, 62, 83 Pac. Rep. 76; Tredinnick v. Red Cloud Consol. G. M. Co., 72 Cal. 78, 80, 13 Pac. Rep. 152.

See **Kerr's Cyc. Code Civ. Proc.,** § 4.

Compare: §§ 24 et seq., ante.

Montana. All that the statute requires is that a person wishing to avail himself of the benefit of it shall honestly state his account: Smith v. Sherman M. Co., 12 Mont. 524, 31 Pac. Rep. 72; Black v. Appolonio, 1 Mont. 342, 346.

Nevada. Maynard v. Ivey, 21 Nev. 241, 244, 29 Pac. Rep. 1090; Skyrme v. Occidental M. & M. Co., 8 Nev. 221; Hunter v. Truckee

substance, rather than form, is to be regarded.[15] In this connection, the court said: "We are certainly not disposed to defeat the lien by a nice criticism of the language in which the claim is set forth."[16]

Strict construction when. But, on the other hand, the court is not at liberty to uphold a claim of lien in the face of a total omission to comply with the plain requirements of the act.[17] While the rule of substantial compliance above stated is declared for the purpose of effecting a lien, the provision of the statute [18] relating to the forfeiture of liens for wilfully false claims, etc., is penal in its character, and must be strictly construed,[19] and every reasonable intendment is indulged to avoid such penalties.[20]

There is but one rule for all claimants, it has been held, whether they be intermediate or not, and that rule must be determined in view of all the cases likely to arise under the statute.[21]

Lodge, 14 Nev. 24, 28; Lonkey v. Wells, 16 Nev. 271, 274; Malter v. Falcon M. Co., 18 Nev. 212, 2 Pac. Rep. 50.

Oregon. See note 1, ante, this section.

Washington. See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719.

[15] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 333, 80 Pac. 74; Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873; McGinty v. Morgan, 122 Cal. 103, 105, 54 Pac. Rep. 392; Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74; Macomber v. Bigelow, 126 Cal. 9, 16, 58 Pac. Rep. 312.

New Mexico. Hobbs v. Spiegelberg, 3 N. M. 357, 5 Pac. Rep 529 (1880).

[16] Wood v. Wrede, 46 Cal. 637, 638; Malone v. Big Flat G. M. Co., 76 Cal. 578, 585, 18 Pac. Rep. 772. See Castagnetto v. Coppertown M. & S. Co., 146 Cal 329, 333, 80 Pac. Rep. 74.

[17] Wood v. Wrede, 46 Cal. 637, 638.

Nevada. The omissions cannot, in essential particulars, be aided by any averments of the complaint, or by extrinsic evidence: Malter v. Falcon M. Co., 18 Nev. 209, 213, 2 Pac. Rep. 50.

New Mexico. See Ford v. Springer L. Assoc., 8 N. M. 37, 49, 41 Pac. Rep. 541.

[18] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[19] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 365, 27 Pac. Rep. 743. See "Forfeiture," §§ 632 et seq., post.

[20] Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

[21] Wagner v. Hansen, 103 Cal. 104, 108, 37 Pac. Rep. 195; McGinty v. Morgan, 122 Cal. 103, 54 Pac. Rep. 392.

But see §§ 28 et seq., and § 42, ante.

And see "Contract," §§ 387 et seq., post.

Washington. United States Sav. L. & Bldg. Co. v. Jones, 9 Wash. 434, 440, 37 Pac. Rep. 666.

§ 372. **Same. General rule for determination of sufficiency of claim.** In order to determine whether a claim of lien is sufficient, it is only necessary to compare its terms with the language of the statute which provides for the claim. The requirements made by the statutes in many other states differ from those required in California, and, as it is only necessary to consider the requirements of the particular act, the value of decisions under different statutes depends upon the relative similarity of the same.[22]

§ 373. **Same. What generally required.** The claim need not state what is implied by law,[23] although it is thought that conclusions of law may be stated, under certain circumstances.[24]

With reference to the fullness of the statements, it has been said: "We cannot think that the statements in a notice [claim] of lien are required to be made with greater fullness or formality than is necessary in a pleading. We are not prepared to say that as much fullness or formality is required." [25]

[22] Corbett v. Chambers, 109 Cal. 178, 180, 41 Pac. Rep. 873.

Colorado. The statement must contain all that the law requires it to contain, but it need not contain anything more; and there is no reason, outside of the statute, why the statement should show the time of furnishing any material, first or last: Mouat L. Co. v. Freeman, 7 Colo. App. 152, 42 Pac. Rep. 1040 (1883, 1889).

[23] Jewell v. McKay, 82 Cal. 144, 152, 23 Pac. Rep. 139.

See § 374, post.

Colorado. See Small v. Foley, 8 Colo. App. 435, 439, 47 Pac. Rep. 64.

Washington. See Fairhaven L. Co. v. Jordan, 5 Wash. 729, 734, 32 Pac. Rep. 729 (Gen. Stats., § 1667).

[24] In McDonald v. Backus, 45 Cal. 262, 265, it was held that the provision as to "the name of the person by whom he was employed, or to whom he furnished the materials," is intended to be a statement of a fact, and not of a mere conclusion of law; but in Malone v. Big Flat G. M. Co., 76 Cal. 578, 584, 18 Pac. Rep. 772, the court say, in reference to this decision: "Possibly that case was correctly decided. We express no opinion as to it. But we do not think that the broad statement as to conclusions of law can be maintained. . . . But we should prefer not to lay down any rule about facts and conclusions of law. And in this connection we may say, as was said in Wood v. Wrede, 46 Cal. 637, 638, that 'we are certainly not disposed to defeat a lien by a nice criticism of the language in which the claim is set forth.'"

Washington. See Collins v. Snoke, 9 Wash. 566, 570, 38 Pac. Rep. 161.

[25] Jewell v. McKay, 82 Cal. 144, 151, 23 Pac. Rep. 139.

Colorado. Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402.

Truth of statements. Subject to the limitations as to errors and mistakes hereafter to be stated,[26] the claim must be true in all essential particulars.[27]

Variance. But a variance from the strict requirements of the statute, which is not a substantial one, and which does not injure or prejudice any one, will not invalidate the claim of lien.[28]

§ 374. **Same. Unnecessary statements.** Some of the general principles determining what it is unnecessary to state in the claim of lien are elsewhere considered.[29]

Implications of law. Contract. It has been said by the court: "The code does not require the notice [claim] to state implications made by law.[30] For example, if there was nothing but a request for labor or materials, and a silent compliance with it, we do not think that a statement of the implied promise to pay what the labor or materials were reasonably worth would be necessary. . . . Nor do we think that it is necessary to state facts showing a performance of the contract, or other facts necessary to complete the cause of action. For example, in the cases above put, it would not be necessary to state that the labor or materials were in fact furnished as provided by the contract, or that they were reasonably worth the sum claimed. The statute does not require the notice [claim] to state anything subsequent to or outside of the contract." [31]

Knowledge of owner. It is not necessary to state in the claim that the owner of the land had personal or actual

[26] See §§ 389, 412 et seq., post.

[27] Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 381, 51 Pac. Rep. 555.

Utah. Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[28] See Ward v. Crane, 118 Cal. 676, 50 Pac. Rep. 839.

See "Names," §§ 379 et seq., post; "Variances," §§ 835 et seq., post.

[29] See §§ 370-373, ante.

[30] Jewell v. McKay, 82 Cal. 144, 152, 23 Pac. Rep. 139. See Reed v. Norton, 90 Cal. 590, 597, 26 Pac. Rep. 767, 27 Pac. Rep. 426.

Oregon. See Osborn v. Logus, 28 Oreg. 302, 320, 38 Pac. Rep. 190, 42 Id. 997. But see Getty v. Ames, 30 Oreg. 573, 577, 48 Pac. Rep. 355, 60 Am. St. Rep. 835.

[31] See § 373, ante.

knowledge that the work was being done, nor anything about the knowledge of the owner.[32]

Contractual relation with owner. Neither is it necessary to show any contractual or other relation between the owner of the property, or the person named as owner, and the employer or the person to whom the materials were furnished;[33] nor whether the latter had authority to bind the owner, or to entitle him to create a lien.[34]

Other statements. It is not necessary to set forth the title of the employer, nor the relation between the person in possession and the owner, which would often be beyond the knowledge of the claimant, and difficult, if not impossible, to ascertain;[35] nor the date of the completion of the work or structure;[36] nor that the claim was filed within thirty days

[32] Jewell v. McKay, 82 Cal. 144, 146, 23 Pac. Rep. 139.

New Mexico. Springer L. Assoc. v. Ford, 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170, citing the California case.

Washington. Nor that the owner caused the building to be erected: Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001.

[33] Corbett v. Chambers, 109 Cal. 178, 183, 41 Pac. Rep. 873; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 646, 22 Pac. Rep. 860; Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74.

See §§ 390, 391, post.

New Mexico. Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586; Springer L. Assoc. v. Ford, 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170.

Oregon. Osborn v. Logus, 28 Oreg. 302, 320, 38 Pac. Rep. 190, 42 Id. 997, **overruling** Rankin v. Malarkey, 23 Oreg. 593, 32 Pac. Rep. 620, 34 Id. 816; Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67; Willamette S. M. L. & M. Co. v. McLeod, 27 Oreg. 272, 40 Pac. Rep. 93.

Utah. Nor the conditions of the contract between the subcontractor and the original contractor; nor that the several contracts shall be separately stated: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1009 (under §§ 10, 15, 17, ch. xxx, Laws 1890).

Washington. Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001 (under 2 Ballinger's Ann. Codes and Stats, § 5904, which prescribed a form of claim, and a line of authorities under preceding statutes, no longer being authority). See Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 421.

Under act of 1893, it was no longer necessary to set forth the terms of the contract: Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144.

[34] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 646, 22 Pac. Rep. 860.

Oregon. Osborn v. Logus, 28 Oreg. 302, 320, 38 Pac. Rep. 190, 42 Id. 997.

It is a matter of pleading and proof at the trial: Osborn v. Logus, supra.

[35] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74.

[36] Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248.

Oregon. Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67, **following** Slight v. Patton, supra.

from its completion;[37] nor that the building has been completed;[38] nor, it seems, the date of the contract;[39] nor any time when the contract was made, or when any transaction took place between the parties;[40] nor the time of payment, or time agreed for the completion of the contract, when none is expressly fixed;[41] nor that the labor was done or materials furnished for the particular property;[42] nor that the materials were to be used,[43] or were actually used, in the building.[44] Neither is it necessary to state in the claim that the work done under section eleven hundred and ninety-one of

[37] Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248.

[38] Harmon v. Ashmead, 68 Cal. 321, 323, 9 Pac. Rep. 183.

[39] See Hicks v. Murray, 43 Cal. 515, 523 (dissenting opinion of Crockett, J.), and Davis v. Livingston, 29 Cal. 283, 287 (1862).

Nevada. But see Hunter v. Truckee Lodge, 14 Nev. 24, 31 (1875).

Oregon. Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Id. 54.

Utah. Contra: Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

Washington. See contra: Tacoma L. & M. Co. v. Kennedy, 4 Wash. 305, 30 Pac. Rep. 79.

[40] Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 569, 42 Pac. Rep. 154; California Powder Works v. Blue Tent Consol. H. G. M. Co. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391.

Colorado. Under acts of 1889 and 1893 it was not necessary to set forth the dates when the first and last materials were furnished: Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 181.

[41] California P. W. v. Blue Tent Consol. H. G. M. Co. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391.

Colorado. So of time of furnishing first and last materials: Mouat L. & I. Co. v. Freeman, 7 Colo. App. 152, 42 Pac. Rep. 1040.

Oregon. Nottingham v. McKendrick, 38 Oreg. 495, 63 Pac. Rep. 822, 57 Id. 195.

Washington. Time when claimant ceased to furnish material should be stated: Johnston v. Harrington, 5 Wash. 73, 31 Pac. Rep. 316.

[42] Hills v. Ohlig, 63 Cal. 104.

See § 397, post.

Washington. Fairhaven L. Co. v. Jordan, 5 Wash. 729, 734, 32 Pac. Rep. 729 (Gen. Stats., § 1667).

[43] Gordon v. South Fork C. Co., 1 McAl. 513, 10 Fed. Cas. 817.

Nevada. Nor is it necessary to specify the particular kind of work: Maynard v. Ivey, 21 Nev. 241, 29 Pac. Rep. 1090.

Oregon. See Dillon v. Hart, 25 Oreg. 49, 34 Pac. Rep. 817.

Utah. Contra: Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[44] Nelhaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255. See Tibbetts v. Moore, 23 Cal. 208, 215 (1856).

And see §§ 375 et seq., post.

Utah. Contra: Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

Washington. See contra: Fairhaven L. Co. v. Jordan, 5 Wash. 729, 32 Pac. Rep. 729; Johnston v. Harrington, 5 Wash. 73, 81, 31 Pac. Rep. 316.

the Code of Civil Procedure is done in an incorporated city, where it describes the property as situated in such city, as the city of San Diego, the court taking judicial notice that it is an incorporated city.[45]

Surplusage. Mere surplusage,[46] or misstatement of facts not material,[47] does not vitiate the claim; although, as in the case of the date of the contract, such misstatement may be a limitation upon the amount of the recovery.[48]

§ 375. Statement of demand, after deducting credits and offsets.[49] The claim filed must contain a "statement of his demand, after deducting all just credits and offsets."[50] This is thought to mean something different from the statement of the "terms, time given, and conditions of the contract";[51]

[45] Bryan v. Abbott, 131 Cal. 222, 225, 63 Pac. Rep. 363.

[46] See McIntyre v. Trautner, 63 Cal. 429, 431.

Colorado. Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. 519 (amount to become due, statement, 1889).

[47] Harmon v. Ashmead, 68 Cal. 321, 323, 91 Pac. Rep. 183. See Neihaus v. Morgan, 45 Pac. Rep. 255.

See "Error in Claim," §§ 412 et seq., post.

Oregon. Chamberlain v. Hibbard, 26 Oreg. 428.

[48] See §§ 387 et seq., and §§ 411 et seq., post.

[49] **As to error or mistake in the statement of the demand,** or of the amount of credits and offsets allowed, or of the balance asserted to be due claimant, see **Kerr's Cyc. Code Civ. Proc.,** § 1203a (a new section, added by Stats. and Amdts. 1907, p. 858).

See also "Uncertainty and Error," §§ 411 et seq., post.

Colorado. Failure to specify the amount as due and owing under a written contract: See Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 422.

[50] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

New Mexico. See Ford v. Springer L. Assoc., 8 N. M. 37, 51, 41 Pac. Rep. 541.

Washington. See United States Sav. L. & Bldg. Co. v. Jones, 9 Wash. 434, 37 Pac. Rep. 666; Merchant v. Humeston, 2 Wash. Ter. 433; Wheeler v. Port Blakeley M. Co., 2 Wash. Ter. 71, 3 Pac. Rep. 635.

[51] See §§ 387 et seq., post.

Cases do not seem to be very clear upon this point. But see Goss v. Strelitz, 54 Cal. 640, 643; Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195; Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 591, 25 Pac. Rep. 747.

New Mexico. This expression means a statement of "indebtedness": Minor v. Marshall, 6 N. M. 194, 201, 27 Pac. Rep. 481; Hobbs v. Spiegelberg, 3 N. M. 357, 361, 5 Pac. Rep. 529 (1880; claim, "after deducting all credits"; statute (§ 6), "after deducting all just credits and offsets"; held, sufficient).

Oregon. "'Demand,' as used in the act, evidently means the thing claimed as due, which, in this class of cases, is a sum of money, and a statement of the demand would be a recital of facts out of which it arises": Ainslie v. Kohn, 16 Oreg. 363, 19 Pac. Rep. 97.

and a statement that the claimant was to receive a certain sum upon the completion of the work is not a sufficient statement of his demand.[52]

"Demand" means what. It is thus evident that the "demand" is not necessarily the contract price;[53] nor does the expression mean an itemized account;[54] but a statement of

[52] Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195. See Fernandez v. Burleson, 110 Cal. 164, 167, 42 Pac. Rep. 566, 52 Am. St. Rep. 75; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 380, 51 Pac. Rep. 555.

[53] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 381, 51 Pac. Rep. 555.

[54] **"Demand."** In the case of Jewell v. McKay, 82 Cal. 144, 150, 23 Pac. Rep. 139, it was said: "The statute, as it stood in 1858, required that the notice should give 'a just and true account of the demand.'"

Itemizing unnecessary. "And, under this provision, it was held in Brennan v. Swasey, 16 Cal. 141, 76 Am. Dec. 507, that an itemized account was not necessary, the court, per Cope, J., saying, 'It was unnecessary to set out the items of the account. Nothing more was required than a statement of the demand, showing its nature and character and the amount due or owing thereon': See also Selden v. Meeks, 17 Cal. 129, 131; Heston v. Martin, 11 Cal. 42; Davis v. Livingston, 29 Cal. 283": Jewell v. McKay, supra.

"The word 'demand' was construed in Brennan v. Swasey, above quoted, and, under that decision, it must be held that the word does not mean an itemized account": Jewell v. McKay, supra. But see Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195.

Under the act of 1862, § 5 of which required "a written notice to the employer of the original contractor, of the nature and extent of their claims against the original contractor or his assigns, over and above all payments and offsets for work and labor done or agreed to be done, or materials furnished or agreed to be furnished, for such construction or repair," where the notice simply notified the owners that the claimant held them responsible for a specified sum "for turning and materials furnished for your houses on Powell Street, ordered by Gosling & Shelden," the contractors, it was held that the "statement prescribed is a statement of claims as affected by payments and offsets, and there is nothing in the notice . . . bearing either directly or indirectly upon that point": Davis v. Livingston, 29 Cal. 283, 287; but it was held in the same case that it was not necessary to state the particular character of the materials, as "the nature and extent" of the claim may be as well understood without it.

Hawaii. The notice of lien for materials furnished by a subcontractor should show the nature and character of the materials for which the lien is claimed: Allen v. Redward, 10 Hawn. 151, 160.

Montana. See Bardwell v. Anderson, 13 Mont. 87, 32 Pac. Rep. 285, as to particularity of account. "A just and true account" does not imply, necessarily, the exact amount a jury or court might find due under the contract: Smith v. Sherman, 12 Mont. 524, 31 Pac. Rep. 72; Black v. Appolonio, 1 Mont. 342, 346; Nolan v. Lovelock, 1 Mont. 224; Merrigan v. English, 9 Mont. 113, 22 Pac. Rep. 454, 5 L. R. A. 837.

Nevada. Items not required; it is sufficient to set forth a statement of the demand, showing its nature and character, and the amount due or owing thereon: Lonkey v. Wells, 16 Nev. 271.

the amount due as affected by credits and offsets.[55] Where, however, the statutory original contract is void because not filed, the claim may aver the contract price for the materials,

New Mexico. But see Hobbs v. Spiegelberg, 3 N. M. 361, 5 Pac. Rep. 529; and see Springer L. Assoc. v. Ford, 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170.

Oregon. Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67; Ainslie v. Kohn, 16 Oreg. 363, 19 Pac. Rep. 97, **distinguished** in Gates v. Brown, 1 Wash. 470, 473, 25 Pac. Rep. 914; Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437.

See §§ 387 et seq., post.

Utah. Statement of demand, where an action to reform certain alleged fraudulent estimates of the engineer was pending: Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 34 Pac. Rep. 368.

Washington. Where there is no separate contract for the labor and for the materials, but one contract for everything required in the prosecution of any particular work, the claim cannot and should not set out separate amounts for the material and for the labor: Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789. But contra where the claim stated that, "pursuant to the contract, the lienors did furnish to J. . . . certain materials and labor, as one continuous running account, and as ordered by him, which was reasonably worth $1,789.27": United States Sav. L. & Bldg. Co. v. Jones, 9 Wash. 434, 439, 37 Pac. Rep. 666. And it seems to be held in the last-mentioned case that it is necessary to describe the kind of material furnished: "We have held that a statement of the demand requires something more than a statement of the amount claimed": Id.

It was formerly held, in the case of material-men, that "a reasonable bill of items" was required: Fairhaven L. Co. v. Jordan, 5 Wash. 729, 32 Pac. Rep. 729; Gates v. Brown, 1 Wash. 470, 25 Pac. Rep. 914; Warren v. Quade, 3 Wash. 750, 29 Pac. Rep. 827; but see Tacoma L. & Mfg. Co. v. Kennedy, 4 Wash. 305, 30 Pac. Rep. 79.

An exhibit or itemized statement, made a part of the claim, may be sufficient as a statement of the amount due after deducting all just credits and offsets, without stating that the cash credits were all the payments made on account of the material furnished: Johnston v. Harrington, 5 Wash. 73, 80, 31 Pac. Rep. 316. The fact that there was no other indication of the character of the materials, than that it was "mdse.," rendered the claim insufficient, notwithstanding the fact that the billhead showed the nature of the material in which the claimant dealt: Fairhaven L. Co. v. Jordan, supra. In this case it was also held that a claim for a balance is insufficient, citing Gates v. Brown, supra.

[55] See authorities in preceding foot-note.

Oregon. Failure to allow as a credit the amount received by claimant on the sale of certain groceries alleged to have been improperly sold, held to vitiate the lien: Lewis v. Beeman, 46 Oreg. 311, 80 Pac. Rep. 417.

Effect of false statement. "Where the claimant seeks to enforce his lien against the property of one with whom he did not contract, and to whom he did not furnish labor or material, and in his statement, as filed, neglects to deduct from the amount of his claim payments which have been made thereon, and thereby puts on record a statement which he knows, or could have known by the exercise of reasonable diligence, was not 'a true statement of his claim, after deducting all just credits and offsets,'" he loses his lien, in the absence of a saving statute: Nicolai Bros. Co. v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288.

and this statement is a sufficient showing, prima facie, of their value.[56]

What sufficient compliance with statute. There is a sufficient compliance with the statute when the claim states that the reasonable value of materials furnished by plaintiffs for each of the two houses was a specified sum, no part of which has been paid, and that the total sum for the two houses (designating it), "in gold coin of the United States," is still due on such buildings, after deducting all just credits and offsets.[57]

The clause under discussion does not require, in the case of materials, a statement that they were furnished to be used in the building.[58]

§ 376. **Same. Object of provision as to demand.** The object of the provision requiring the claim of lien to contain

"After deducting all credits," etc. It is not necessary to use the expression, "after deducting all just credits and offsets"; and it is sufficient if notice be given of the amount of the claim: Ainslie v. Kohn, 16 Oreg. 363, 19 Pac. Rep. 97; Kezartee v. Marks, 15 Oreg. 529, 535, 16 Pac. Rep. 407; Whittier v. Blakesley, 13 Oreg. 546, 11 Pac. Rep. 305 (1874).

[56] Bringham v. Knox, 127 Cal. 40, 44, 59 Pac. Rep. 198. No direct reference, however, was made in this case to the requirement of the statute regarding the "demand," or, in fact, to any requirement relative to the claim of lien.

[57] Neihaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255.

Colorado. Where the notice simply gave the balance due, the statute requiring "an abstract of indebtedness, showing the whole amount of debt, the whole amount of credit, and the balance due, or to become due, to the claimant": held, insufficient: Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456 (1883). See Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458.

Where the statement set out that the contract price was two hundred and fifty dollars, that the owner had paid one hundred and twenty-five dollars, "and that the sum of $—— is still due and owing"; held, sufficient, as no one could be misled: Harris v. Harris, 9 Colo. App. 211, 47 Pac. Rep. 841.

Where the statement embraced several assigned liens, and the total amount due on each claim separately was given, but only the aggregate credit was given, it was held sufficient: Small v. Foley, 8 Colo. App. 435, 443, 47 Pac. Rep. 64. But otherwise if the sums due are not given: Small v. Foley, supra; Hanna v. Savings Bank, 3 Colo. App. 28, 31 Pac. Rep. 1020.

[58] Neihaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255. See Tibbetts v. Moore, 23 Cal. 208, 215 (1856).

See also "Unnecessary Statements," §§ 374 et seq., ante, and § 413, post.

As to Utah and Washington, see notes to § 374, ante.

a statement of the claimant's demand, after deducting all just credits and offsets, is to inform the owner as to the extent and nature of the lienor's claim, so that he may act thereon in his settlement with the contractor.[59]

§ 377. Same. Commingling lienable and non-lienable items. When an unspecified and undeterminable portion of the materials mentioned in the claim consists of non-lienable items which cannot be segregated from the general aggregate, the claim is of no effect;[60] but if the items can be separated, the rule is otherwise.[61]

[59] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 381, 51 Pac. Rep. 555.

Colorado. Its object is to inform any interested party of the actual condition of the account and the amount for which a lien is claimed: Harris v. Harris, 9 Colo. App. 211, 219, 47 Pac. Rep. 841.

[60] McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622.

Arizona. Where lienable and non-lienable items are commingled in the same claim, it is proper to receive evidence in order to segregate the lienable items, in the absence of fraud or bad faith. Thus such evidence was allowed where the non-lienable items were otherwise lienable, but a claim therefor had not been filed within the proper time: Wolfley v. Hughes, 71 Pac. Rep. 951.

Hawaii. Bierce v. Hutchins, 16 Hawn. 418, 425, 717.

New Mexico. A claim for a fixed sum for all services under an entire contract, part of the services being non-lienable, is void, under Comp. Laws, § 1520: Boyle v. Mountain K. M. Co., 9 N. M. 237, 50 Pac. Rep. 347.

Oregon. "Where lienable and non-lienable items are included in one contract for a specific sum, or are made the basis of a lumping charge, so that it cannot be perceived from the contract or account what proportion is chargeable to each, the benefit of the mechanic's-lien law is lost. In such cases the court cannot, by extrinsic evidence, apportion the amount of the entire charge or contract price between the lienable and non-lienable items. But where the claimant's demand, made in good faith, consists of several different items, separately charged, some of which are, by law, a lien upon the property, and others do not come within the scope of the statute, he may enforce his lien so far as given by law, and it is not vitiated because he has included therein non-lienable items": Getty v. Ames, 30 Oreg. 573, 48 Pac. Rep. 355, 60 Am. St. Rep. 835; Allen v. Elwert, 29 Oreg. 428, 444, 44 Pac. Rep. 823, 48 Pac. Rep. 54; Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 274, 76 Am. St. Rep. 454.

Washington. Where non-lienable items are included in the claim of lien, under the honest belief that they are lienable, a personal judgment could only be entered against the owner on the non-lienable items: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720 (under Ballinger's Ann. Codes and Stats., § 5907).

[61] See § 414, post.

As to effect of non-lienable items on lien, see note 4 Am. & Eng. Ann. Cas. 836.

§ 378. **Same. Demands against two or more buildings.** With reference to specifying the several amounts due on each of two or more buildings, etc., under the California statute,[62] and under similar provisions, it has generally been held that the failure to designate such amounts does not invalidate the lien, but affects only its priority.[63] The latter subject will be considered in detail hereafter.[64]

§ 379. **Names required to be stated in claim. In general.** The statute[65] provides: "Every original contractor, . . . and every person, . . . must file . . . a claim containing a statement of his demand, . . . with the name of the owner

Mechanic's lien not vitiated because the claim covered, in part, articles not subject to lien, it not appearing that the claim was willfully so made: Barnes v. Colorado Springs & C. C. D. R. Co. (Colo., March 2, 1908), 94 Pac. Rep. 570.

[62] **Kerr's Cyc. Code Civ. Proc.,** § 1188.

[63] See Snell v. Payne, 115 Cal. 218, 46 Pac. Rep. 1069; Booth v. Pendola, 88 Cal. 36, 43, 23 Pac. Rep. 200, 25 Pac. Rep. 1101. See "Description," § 406, post.

As to mechanic's lien on separate buildings located on non-contiguous lots, see note 2 Am. & Eng. Ann. Cas. 685.

Colorado. See Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64.

Idaho. Effect of failure to specify amount due on each property is to postpone lien: Phillips v. Salmon River M. & D. Co., 9 Idaho 149, 72 Pac. Rep. 886 (under Sess. Laws 1899, p. 148, § 7).

New Mexico. Lien filed against several mining claims is not void because the amounts against each claim are not separated in the claim: Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087 (under Comp. Laws 1897, § 2222).

Utah. Under Rev. Stats. 1898, § 1387, the court is at liberty to hold the claim insufficient or not, as equity demands in the particular case, where the claim fails to state the amount due on each building; but otherwise under preceding statutes, which rendered the claim invalid: Eccles L. Co. v. Martin, 87 Pac. Rep. 713.

The statement required by Rev. Stats. 1898, § 1386, is for the purpose of acquiring a lien, but that required by § 1387 relates to priorities: Id.

It is not necessary for the claim to recite the work done or materials furnished under each of two or more separate contracts; but it is sufficient to state the total amount of debt and credit, and balance due: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008 (under Laws 1890, ch. xxx, § 17).

Washington. The effect of failing to designate in the claim of lien the amount due on each of two buildings is merely to postpone it to other liens, and not to invalidate it: Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001 (under 2 Ballinger's Ann. Codes and Stats., § 5907). But see Heald v. Hodder, 5 Wash. 677, 32 Pac. Rep. 728; Merchant v. Humeston, 2 Wash. Ter. 433, 7 Pac. Rep. 903.

[64] See "Priorities," §§ 486 et seq., post.

[65] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials." [66]

The object of this statement in his claim is to designate the person against whom he seeks to establish the lien, as well as to protect others in their dealings with the property.[67] The purpose of this designation is to point out the individual who is to be affected thereby, rather than the attribute of ownership; and if the individual against whose property the lien is claimed is specified, he receives all the notice which is intended by the statute, irrespective of whether he is designated as owner or reputed owner.[68]

Substantial compliance with the statute, in regard to names, is sufficient, if the owner is not misled or prejudiced by reason of any misstatement in the claim.[69]

§ 380. **Same. Name of owner or reputed owner.** The statute [70] requires the claim to state "the name of the owner

[66] **Stating quantity of materials.** As to circumstances under which it is not necessary for the claimant to state the quantities of material furnished to different persons named, under this clause, see Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 619, 25 Pac. Rep. 124; Gordon H. Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 623, 25 Pac. Rep. 125.

Substantial compliance with the statutory requirements as to making out in writing and verifying claim of lien is necessary, in order to charge, under the provisions of the mechanic's-lien law, the land or building of a third party with a debt incurred by another and not by the owner: Hogan v. Bigler (Cal. App., April 9, 1908), 96 Pac. Rep. 97.

For unnecessary statements, see § 374, ante.

[67] Corbett v. Chambers, 109 Cal. 178, 185, 41 Pac. Rep. 873; Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41.

[68] Corbett v. Chambers, 109 Cal. 178, 185, 41 Pac. Rep. 873. See Reed v. Norton, 90 Cal. 590, 596, 26 Pac. Rep. 767, 27 Pac. Rep. 426; Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41.

See § 365, ante.

[69] West Coast L. Co. v. Apfield, 86 Cal. 335, 341, 24 Pac. Rep. 993; Reed v. Norton, 90 Cal. 590, 596, 26 Pac. Rep. 767, 27 Pac. Rep. 426. See Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 619, 25 Pac. Rep. 124.

Montana. Richards v. Lewisohn, 19 Mont. 128, 133, 47 Pac. Rep. 645, 647.

Oregon. See Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Pac. Rep. 190, 42 Pac. Rep. 997; but see Gordon v. Deal, 23 Oreg. 153, 31 Pac. Rep. 287.

[70] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

or reputed owner, if known."[71] A substantial compliance with section eleven hundred and eighty-seven, as to the claim

[71] **Montana.** Whenever a particular statute requires the claim to contain the name of the owner or reputed owner, the general rule is, that the omission of this detail is fatal to the lien. In Montana L. & M. Co. v. Obelisk M. & C. Co., 15 Mont. 20, 37 Pac. Rep. 897, the court assumed that the provisions of the Compiled Statutes of 1887 (Comp. Stats. 1887, div. v, §§ 1371-1373, and amendments, Laws 1887, p. 71), which are substantially the same as §§ 2131 and 2132 of the Code of Civil Procedure, requiring the claim of lien to state the name of the owner. Again, in Richards v. Lewisohn, 19 Mont. 128, 47 Pac. Rep. 645, it was said that this construction of the provisions of the Compiled Statutes was necessary, in order that they might be made harmonious and rendered effective. A compliance on the lienor's part enables the clerk to perform his duty, which, otherwise, he could not do: Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

If sought to affect the building only, the same requirement should have been observed. In Montana L. & M. Co. v. Obelisk M. & C. Co., 15 Mont. 20, 37 Pac. Rep. 897, the court approved this construction of the statute, for it was there held that it was not necessary to state the name of the owner of the fee, but that the name of the lessee was sufficient, where it was sought to charge its interest only. So long as the record owner of the fee or other interest to be charged is the person who is to be affected by the claim, he is the owner, within the meaning of the statute, and it is necessary to name him as the owner; but if the person for whose benefit the improvement is erected does not appear of record as the owner, it is nevertheless incumbent on the claimant to insert such owner's name in the claim: Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 991, 994. And see Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678.

As to building or improvement distinct from the land, see note 2 Am. & Eng. Ann. Cas. 689-691.

Omission of the name of the owner whose interest is to be charged cannot be supplied by the complaint: Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678 (variance between names).

Oregon. It is essential that the name of the owner or reputed owner shall be stated: Gordon v. Deal, 23 Oreg. 153, 27 Pac. Rep. 287; that is, the name of the "owner of the building or other improvements": Kezartee v. Marks, 15 Oreg. 529, 16 Pac. Rep. 407 (under § 3673, Hill's Code). It should not appear incidentally, or as part of the description of the property, but it must appear on the face of the claim as an independent matter, either directly or by necessary inference: Gordon v. Deal, supra.

Washington. In Wright v. Cowie, 5 Wash. 341, a claim was held insufficient because the owner of a leasehold interest in a portion of the land covered by the building, and of a part of the building erected thereon, was not made a party to the claim. Where the claim stated that a certain company was the owner and reputed owner "of said railroad," but there was no reference to the ownership of the land over and through which said railway was constructed, or of the ownership of the right of way thereof, it was held insufficient: Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. Rep. 396; Front Street Cable R. Co. v. Johnson, 2 Wash. 112, 25 Pac. Rep. 1084, 11 L. R. A. 693.

As to mechanic's lien on leasehold estate, see note 3 Am. & Eng. Ann. Cas. 1096.

With reference to the name of the owner or reputed owner, under § 5904, Ballinger's Ann. Codes and Stats., which was similar to the California provision, it was also provided, "if not known, that fact

of lien, relative to the ownership of the property, is all that is required.[72]

shall be mentioned." Under this section it was held that the claim was not invalidated because the claimant was mistaken as to who was the owner of the realty, no one being misled to his damage; and where the claim stated that the "name of the owner and reputed owner of such premises is, and at all times mentioned herein was, J. Co., and that one S. is the owner of the ground on which said plant is located," and set forth a leasehold interest in said company, it was held sufficient, although the real owner of the land was another than the one stated: Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. Rep. 815.

Mistake as to legal and equitable ownership. A claim of lien is sufficient which states that the real owner has but an equitable interest in the premises, and mistakingly attributes the legal ownership to another, who has no interest in the premises, there being no interested subsequent purchasers or encumbrancers, and the real owner not being injured or misled by the statement that he was the equitable owrer only, as all persons by proper inquiry could ascertain the real facts of the case; and if the claim had stated that S. was the owner and reputed owner of the premises, the fact that he owned a greater interest in the land than that set out in the claim would not invalidate the lien: Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099.

Husband and wife. Where it did not appear on the face of the claim that the claimant had knowledge of the fact that the wife of the owner had an interest therein, the omission of her name did not vitiate it: Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099; Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712; Douthitt v. MacCulsky, 11 Wash. 601, 606, 40 Pac. Rep. 186.

Cases distinguished. These cases do not fall within the principles announced in Littell-Smythe Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. Rep. 1035, and Sagmeister v. Foss, 4 Wash. 320, 30 Pac. Rep. 80, 744. See Chehalis County v. Ellinger, 21 Wash. 638, 644, 59 Pac. Rep. 485, as to the last-mentioned case.

In Littell-Smythe Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. Rep. 1035, it was held that in all suits to foreclose liens upon community real estate the wife was a necessary party defendant; and in Sagmeister v. Foss, 4 Wash. 320, 30 Pac. Rep. 80, 744, that the claim of lien against the husband and his interest in certain realty, which shows upon its face that the claimant had knowledge that the wife had a community interest in the real estate, is defective, the claim stating a certain person to be the owner, and alluding to the "community interest of the wife of said" person. See also Collins v. Snoke, 9 Wash. 566, 571, 38 Pac. Rep. 161, and Turner v. Bellingham Bay L. & Mfg. Co., 9 Wash. 484, 37 Pac. Rep. 674, explaining these cases to substantially the same effect.

In Washington Rock Plaster Co. v. Johnson, 10 Wash. 445, 39 Pac. Rep. 115, it was said: "The paper title was in the name of the husband, and knowledge of the fact that he had a wife was not so brought home to the plaintiff as to make it necessary that it should name her as one of the owners of the property. Besides, the necessity of making her a party to the lien notice, in any case where the record title is in the husband alone, may well be doubted." And so in claiming a lien upon the separate property of one spouse, it is not necessary to name the other spouse, even though at the time it is intended to be claimed as a homestead: See Parsons v. Pearson, 9 Wash. 48, 36 Pac. Rep. 974.

[72] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 119, 65 Pac. Rep. 329.

Owner at the time of filing claim. There is no limitation upon the term "owner," as used in the provision above quoted. It does not refer to the owner with whom the contract for the improvement was made, nor to any one but the owner at the date of the filing of the claim, as the latter is the party to be affected thereby, rather than the one who has parted with his property subsequent to the time of the original contract.[73]

Change of ownership. Where there is a change of ownership during the work, the claim is not insufficient because it states the names of all who were owners and reputed owners during all the times stated in the claim, and because it did

[73] **See elaborate historical argument** to establish this proposition, in Corbett v. Chambers, 109 Cal. 178, 181, 41 Pac. Rep. 873; Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41. See Pacific M. L. Ins. Co. v. Fisher, 109 Cal. 566, 569, 39 Pac. Rep. 758.

See "Object," § 365, ante.

Colorado. Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989.

Under the act of 1893, the owner to be named was the owner and holder of the legal title at the time the claim of lien was filed: Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 121, 60 Pac. Rep. 179, 183; and this must appear on the face of the claim, or in the body of the statement, as an integral part or portion of the "declaration of right": Id. The court, alluding to Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519, and Maher v. Shull, 11 Colo. App. 322, 52 Pac. Rep. 1115, said: "What those cases hold, and what they intend to decide, undoubtedly is, that this equitable title and equitable ownership is enough, as between the lien claimant and the holder of the equitable title. It will prevent the equitable owner from objecting to the statement on the ground of its insufficiency in stating the title or the name of the person who owned the property." In a court of equity, the equitable owner, whose name appeared in the claim of lien would not be permitted to contend that the lien statement was insufficient: Id.

Oregon. Willamette S. M. L. & M. Co. v. McLeod, 27 Oreg. 272, 40 Pac. Rep. 93; although at the time of making the contract he had only an equitable interest.

Washington. The name of the owner or reputed owner at the time of filing the claim should be given: Collins v. Snoke, 9 Wash. 566, 570, 38 Pac. Rep. 161. So the name of the legal owner of a leasehold interest on which the lien is claimed, although it may be held merely as security, was held sufficient: Harrington v. Miller, 4 Wash. 808, 812, 31 Pac. Rep. 325.

Where notice stated that defendants were the owners, § 5917, 2 Ballinger's Ann. Codes and Stats., authorized the construction that the defendants were the owners at the time the materials were furnished, and where the notice states that the defendants were the owners, the section authorized the construction that the defendants were still the owners: Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001.

Wyoming. Davis v. Big Horn L. Co., 14 Wyo. 517, 85 Pac. Rep. 980.

As to mechanic's lien on leasehold estate, see note 3 Am. & Eng. Ann. Cas. 1096.

not state at what time the title passed from one owner to another.[74]

Knowledge of name. The claimant may not know the name of the owner, and if he is ignorant of his name, the claim is sufficient if silent on the subject.[75] It is sufficient if the name of the reputed owner is given.[76] Of course, if the claim states that a certain person is the reputed owner, and such person is found to be the owner, the claim is sufficient in this respect.[77] But if the claimant, as a matter of fact, knows the name of the owner or reputed owner, such statement is as material as any other statement required by the statute, and it must be given.[78]

[74] Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41.

[75] West Coast L. Co. v. Newkirk, 80 Cal. 275, 277, 22 Pac. Rep. 231; Corbett v. Chambers, 109 Cal. 178, 183, 184, 41 Pac. Rep. 873. A statement in the last-mentioned case that the claimant may state the fact of such ignorance is dictum; and the decision in Hooper v. Flood, 54 Cal. 218, 222, requiring a statement of the name of the owner or reputed owner, or that such names are unknown, must be considered as impliedly overruled but not noticed by later decisions.

See "Contents of Claim in General," § 370, ante, and "Unnecessary Statements," § 374, ante, and authorities, post, this section, in this connection. See Bryan v. Abbott, 131 Cal. 222, 224, 63 Pac. Rep. 363.

Colorado. A lien claimant can only be charged with knowledge of the ownership of property as apparent upon the public records: Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519.

Montana. Richards v. Lewisohn, 19 Mont. 128, 132, 47 Pac. Rep. 645.

Nevada. Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. Rep. 50. See Maynard v. Ivey, 21 Nev. 241, 29 Pac. Rep. 1090.

Wyoming. See Wyman v. Quayle, 9 Wyo. 326, 63 Pac. Rep. 988, in which it was held that where the claim does not state the name of the owner, and the pleadings do not show that the name of the owner was unknown, the lien is ineffectual. This doctrine is questionable, in the light of the authorities and the principles of construction of such statutes. See also Davis v. Big Horn L. Co., 14 Wyo. 517, 85 Pac. Rep. 980.

[76] Bryan v. Abbott, 131 Cal. 222, 223, 224, 63 Pac. Rep. 363, in which the claim stated "'that Seth Abbott is the name of the reputed owner of said premises, and caused and requested said William McDonald to perform said labor and furnish said materials'; and the complaint alleges, 'That at all the times herein mentioned said defendant Seth Abbott was the owner and reputed owner, and in possession of and personally occupied the following described real property,'" the court saying, "The case of Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174, cited by respondent, does not, either directly or indirectly, hold that the recorded notice of lien must state the name of the owner, but the reasoning of the case and the conclusion reached is entirely consistent with Corbett v. Chambers, 109 Cal. 178, 181, 41 Pac. Rep. 873."

[77] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 80 Pac. Rep. 74.

[78] Hicks v. Murray, 43 Cal. 515, 521 (1868); Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 339 (1868); West Coast L. Co. v. Newkirk, 80 Cal. 275, 277, 22 Pac. Rep. 231.

Montana. See Richards v. Lewisohn, 19 Mont. 128, 132, 47 Pac. Rep. 645 (under Comp. Laws, §§ 1371, 1372).

If claimant does not know name of owner of fee, it is not necessary for him to say that he does not know the name of the reputed owner, but, under such circumstances, the claim may be silent on the subject.[79] But if in good faith he gives the name of the reputed owner, he will not lose his lien if he should afterwards ascertain that some other person is the owner.[80]

Various statements considered. A claim is not vitiated by reason of a statement therein that the husband was the reputed owner of the lot, and that the wife claimed some rights therein and had full knowledge of the signing of the contract, and agreed to the performance of the same, when the evidence did not show that the plaintiff was not justified in assuming that the husband was the reputed owner of the

[79] West Coast L. Co. v. Newkirk, 80 Cal. 275, 276, 22 Pac. Rep. 231; Kelly v. Lemberger (Cal., Sept. 15, 1896), 46 Pac. Rep. 8. See McClain v. Hutton, 131 Cal. 132, 138, 63 Pac. Rep. 182, 622, 61 Id. 273.

See also note 75, this section.

Alaska. A claim failing to state the name of the owner of the building, or that the name of the owner was unknown, but stating the name of the holder of the legal title to the land, and the name of the vendee, at whose instance the building was erected, was held insufficient: Russell v. Hayner, 2 Alas. 702 (dig.), 130 Fed. Rep. 90, 64 C. C. A. 424 (under Civ. Code, § 262; act of June 6, 1900, 31 Stats. 534, ch. dcclxxxvi, containing language similar to § 1187 of **Kerr's Cyc. Code Civ. Proc.**). This case is not in line with the authorities, or with the better reasoning.

Montana. Where the christian name was stated to be unknown, it was held to be sufficient: Richards v. Lewisohn, 19 Mont. 132, 47 Pac. Rep. 645 (Comp. Laws, §§ 1371, 1372).

Nevada. Contra: Malter v. Falcon M. Co., 18 Nev. 209, 2 Pac. Rep. 50. And the name of the reputed owner should then be given: Id.

Oregon. See Leick v. Beers, 28 Oreg. 483, 43 Pac. Rep. 658, **citing** Malter v. Falcon M. Co., supra.

Wyoming. The claim must state the name of the owner or that such name is unknown: Wyman v. Quayle, 9 Wyo. 326, 63 Pac. Rep. 988 (under Rev. Stats. 1899).

[80] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873; Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 119, 65 Pac. Rep. 329; Ah Louis v. Harwood, 140 Cal. 500, 504, 74 Pac. Rep. 41; McClain v. Hutton, 131 Cal. 132, 138, 63 Pac. Rep. 182, 622, 61 Id. 273, in which it was held that a claim of lien on the separate property of the wife, giving the names of the husband and wife as the "names of the owners and reputed owners of the said premises," is not void on the ground that the husband has no interest in the property.

Mistake as to party's interest. "Still less can the validity of the claim be affected by a mistake in attempting to carry out the requirements of the law": McClain v. Hutton, 131 Cal. 132, 138, 63 Pac. Rep. 182, 622, 61 Id. 273 (as to name of owner or reputed owner).

Oregon. See Leick v. Beers, 28 Oreg. 483, 43 Pac. Rep. 658.

lot, under an honest mistake as to the real ownership, and without fraud, or for the purpose of deceiving any person.[81]

As the claimant is not required to ascertain at his peril the name of the true owner, and as it is sufficient if he give the name of the reputed owner, if known, an otherwise sufficient claim is not impaired by the fact that the same person is designated as "owner or reputed owner,"[82] or "owner and reputed owner";[83] and in the case last mentioned, if it is proved that he was the reputed owner only, the claim is not ineffectual.[84] And likewise if the claim states that a certain person is the owner of a house and the reputed owner of a leasehold interest in the realty.[85] In a case where the lien set forth that Kelly, Reis, and Corbett were the names of the owners who held the legal title to the premises, and that Ashmead was in possession, and was the name of the reputed owner who had the equitable title, this was held to be sufficient.[86] In either case it is only the opinion of the claimant upon matters that are not presumptively within his knowledge, but which he has formed from "external" informa-

[81] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 119, 65 Pac. Rep. 329.

[82] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873.

New Mexico. Ford v. Springer L. Assoc., 8 N. M. 37, 51, 41 Pac. Rep. 541; s. c. **affirmed** 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170; Minor v. Marshall, 6 N. M. 194, 198, 27 Pac. Rep. 481.

Washington. And this point cannot be raised for the first time on appeal. The action being between the original parties, no one could be misled thereby: Dearborn F. Co. v. Augustine, 5 Wash. 67, 31 Pac. Rep. 327.

[83] Arata v. Tellurium G. & S. M. Co., 65 Cal. 340, 341, 4 Pac. Rep. 195; the court saying, "The same person may be both the owner and the reputed owner, and a statement that a name is the name of the owner is none the less positive because it is also declared to be the name of the reputed owner": McClain v. Hutton, 131 Cal. 132, 138, 63 Pac. Rep. 182, 622, 61 Id. 273. See Bryan v. Abbott, 131 Cal. 222, 223, 224, 63 Pac. Rep. 363.

Oregon. See Willamette S. M. L. & Mfg. Co. v. McLeod, 27 Oreg. 272, 40 Pac. Rep. 93.

Washington. Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001 (under 2 Ballinger's Ann. Codes and Stats., § 5917).

[84] Kelly v. Lemberger (Cal.), 46 Pac. Rep. 8. See this case as to several persons being reputed owners.

[85] West Coast L. Co. v. Newkirk, 80 Cal. 275, 276, 22 Pac. Rep. 231. See Bryan v. Abbott, 131 Cal. 222, 223, 224, 63 Pac. Rep. 363.

[86] Harmon v. Ashmead, 68 Cal. 321, 324, 9 Pac. Rep. 183.

Colorado. A claim which fails to designate the legal owner, but attempts to state the name of the equitable owner, is insufficient as against subsequent encumbrancers and lien-holders: Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 183 (1883).

Washington. See Harrington v. Miller, 4 Wash. 808, 812, 31 Pac. Rep. 325.

tion, and in that respect the claim that he is to file differs from a pleading, in which the facts essential to the recovery must be definitely pleaded.[87]

The fact that conveyances to other persons are on record does not seem to be conclusive of the question of reputed ownership.[88] The claim is not insufficient because it states that a certain person was the owner of the "premises."[89]

Where the claim states, among other things, that a certain person was the owner of the "lot" of land which is described, and that he entered into a contract with certain other designated persons to erect and finish for him a building on the lot, and that claimant gave such person written notice of the furnishing of materials, it is a sufficient statement that said owner of the lot was the owner of the building, which was erected for him on his land.[90] And where

[87] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873.

[88] Kelly v. Lemberger (Cal.), 46 Pac. Rep. 8.

Montana. The owner mentioned in §§ 2132-2135 of the Code of Civil Procedure, whose name must appear in the claim, is the owner of the interest to be charged; and hence the statement of the name of the record owner is not sufficient to charge the interest of the vendee in possession who erects the building: Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

[89] Corbett v. Chambers, 109 Cal. 178, 185, 41 Pac. Rep. 873.

Idaho. But see White v. Mullins, 3 Idaho 434, 31 Pac. Rep. 801. And to state that a mine was the property of the defendant was held not to be an allegation of ownership required by the statute: Steel v. Argentine M. Co., 4 Idaho 505, 42 Pac. Rep. 585, 95 Am. St. Rep. 144.

Oregon. It is sufficient to say that the land is the "property" of (Willamette S. M. L. & Mfg. Co. v. McLeod, 27 Oreg. 272, 40 Pac. Rep. 93), or was owned by (Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67), a certain person, who caused the building to be erected.

Utah. "Said described premises being the property of B. J. Clayton," was held sufficient: Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[90] Russ L. Co. v. Garrettson, 87 Cal. 589, 595, 25 Pac. Rep. 747. The inference from this seems to be that the name of the "owner" should be that of the owner of the building; but see reason for this requirement, §§ 79 et seq., ante.

Oregon. It seems that the name of the owner of the building should be stated: Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67; Kezartee v. Marks, 15 Oreg. 529, 535, 16 Pac. Rep. 407; Gordon v. Deal, 23 Oreg. 153, 154, 31 Pac. Rep. 287. See also Willamette S. M. L. & M. Co. v. McLeod, 27 Oreg. 272, 40 Pac. Rep. 93; and see note ante, this section.

The California case is cited in the first Oregon case, supra.

Presumed that building is attached to land upon which it is erected: Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67; but see Gordon v. Deal, supra.

Name of owner. If the claimant wishes to reach or affect the land with his lien, he should also state the name of the owner thereof: Kezartee v. Marks, 15 Oreg. 529, 16 Pac. Rep. 407.

the claim states that a certain person named is the reputed owner of the land, and that he and another person (his wife) named are the reputed owners of the building, it is sufficient.[91]

§ 381. **Same. Employer. Purchaser.** The name of the person by whom the claimant "was employed," or "to whom he furnished the material," must be stated in the claim of lien.[92]

General rule. If it appears from the claim, either directly or by necessary inference, to whom the materials were furnished, or for whom the labor was performed, there is a sufficient compliance with this provision;[93] and likewise if

[91] Palmer v. Lavigne, 104 Cal. 30, 32, 37 Pac. Rep. 775.

[92] **Kerr's Cyc. Code Civ. Proc.,** § 1187; Corbett v. Chambers, 109 Cal. 178, 183, 41 Pac. Rep. 873; Madera F. & T. Co. v. Kendall, 120 Cal. 182, 183, 52 Pac. Rep. 304, 65 Am. St. Rep. 117.

Name of person to whom material was furnished must be stated in the notice of lien; and where such notice states that material was furnished to a person named, when in fact it was sold to a different person than the one named, it is fatally defective, and the lien cannot be enforced: Hogan v. Bigler (Cal. App., April 9, 1908), 96 Pac. Rep. 97.

The name of the person to whom materials were furnished not being stated, as required by the code, the claim of lien cannot be the basis for a mechanic's lien: Id.

See Jones v. Kruse, 138 Cal. 613, 617, 72 Pac. Rep. 146.

See §§ 374 et seq., ante; § 411, post.

Colorado. Where the claim conveys to the owner sufficient information as to the materials furnished, it may be adequate, although it does not expressly state that claimant furnished the same: Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107.

Idaho. See Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 516.

Nevada. See Skyrme v. Occidental M. Co., 8 Nev. 219, 237.

Oregon. Barton v. Rose, 85 Pac. Rep. 1009; Getty v. Ames, 30 Oreg. 573, 48 Pac. Rep. 355, 60 Am. St. Rep. 835; Rankin v. Malarkey, 23 Oreg. 593, 32 Pac. Rep. 620, 34 Pac. Rep. 816; Dillon v. Hart, 25 Oreg. 49, 34 Pac. Rep. 817; Leick v. Beers, 28 Oreg. 483, 43 Pac. Rep. 658; Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54; Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67.

Washington. Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 317, 39 Pac. Rep. 815. And where the claims stated the name of the person "at whose request" claimants performed labor and furnished materials, and that "at the special instance and request of the J. Co., acting therein by J., its president, it furnished and delivered to said J. Co." certain merchandise, they were held sufficient. See Sautter v. McDonald, 12 Wash. 27, 31, 40 Pac. Rep. 418.

[93] **As to materials furnished for building,** see note 2 Am. & Eng. Ann. Cas. 683.

Oregon. The claim must state directly or by necessary inference to or for whom the materials were furnished or labor performed: Barton

the claimant puts enough in his claim to enable the owner to understand whether the claimant is an original contractor or a subclaimant, or if it shows that the claimant asserts a personal liability against the owner or against some other persons primarily, and against the owner's property as security therefor;[94] provided that the owner is not prejudiced or misled thereby.[95] Thus, while, under this provision, the contractual relation need not be stated, yet a statement of such relation in the claim may furnish the facts from which the name of the employer or purchaser is necessarily inferred.[96]

§ 382. **Same. Under void statutory original contract.** Where the statutory original contract is void, the labor done and materials furnished are deemed to have been done and furnished at the personal instance of the owner, and the name of the owner may be inserted as that of the employer, or the person to whom the materials were furnished, instead of the

v Rose, 85 Pac. Rep. 1009; Nottingham v. McKendrick, 38 Oreg. 495, 63 Pac. Rep. 822, 57 Id. 195; and see Getty v. Ames, 30 Oreg. 573, 48 Pac. Rep. 355, 60 Am. St. Rep. 835; Dillon v. Hart, 25 Oreg. 49, 44 Pac. Rep. 817, 823, 48 Id. 54.

[94] Malone v. Big Flat G. M. Co., 76 Cal. 578, 584, 18 Pac. Rep. 772.

When statement shall show contract with contractor. Where the claim shows the contractual relation between the claimant and the owner to be that of an original contractor or subcontractor, it is sufficient; as, where the contract is that the contractor shall furnish so much labor and receive a certain sum per man, the liability being directly to the contractor, the claim of lien properly states the contract as being with such contractor, instead of with the laborers individually; but it is otherwise if such contractor simply acts the part of the conductor of an employment office: Malone v. Big Flat G. M. Co., 76 Cal. 578, 585, 18 Pac. Rep. 772.

See "Original Contractor," §§ 45, 60, ante. But see "Unnecessary Statements," §§ 374 et seq., ante.

[95] West Coast L. Co. v. Apfield, 86 Cal. 335, 341, 24 Pac. Rep. 993.

A mistake in christian name of employer may not vitiate the claim of lien, if he was sometimes known by the name stated in the claim: Jewell v. McKay, 82 Cal. 144, 145, 23 Pac. Rep. 139. The question was not fully decided, but went off on a point of practice, as the finding was not attacked by the specifications of error. See Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 619, 25 Pac. Rep. 124.

Washington. And where the employer was named "I. B. & L. Association," instead of "I. B. & L. Company," the variance is immaterial, where the corporation is making the improvement, as it could not have been misled; but it was said that the rule might be different if the corporation had not contracted for the improvement: Installment B. & L. Co. v. Wentworth, 1 Wash. 467, 25 Pac. Rep. 298.

[96] See § 391, post.

contractor, or other person to or for whom the same were furnished or done;[97] but, on the other hand, under such circumstances, it will not vitiate the claim if only the name of the person for whom the labor was actually performed or to whom the materials were actually furnished is given.[98]

§ 383. **Same. Inferential statements.** In accordance with the general principles laid down in the preceding sections, a statement from which the name of the employer or purchaser is necessarily inferred is sufficient.

Contractual relation. Request. A claim which states that the labor in a mining claim was performed at the request of a person named is substantially a statement that he was employed by such person, and is sufficient in this respect.[99]

Indebtedness. A claim stating that claimant furnished materials under a contract with the contractors, naming them, by which they agreed to pay the market value thereof at the date of delivery, and that claimant duly gave a written notice to the owner, naming him, that he had agreed to furnish materials, as aforesaid, sufficiently states the names of the persons to whom the materials were furnished.[100]

Where the claim states "that H. and J. W., who are the owners of said building and real estate, are indebted to us in the sum of nine hundred and thirty-four dollars and seventy cents, in gold coin, for materials furnished to and used by said H. and J. W. in the erection of said building," the claim sufficiently states by whom the contract was made and the persons to whom the material was furnished.[101]

Where the claim states that certain work was performed for a person named, and that said person ordered certain extra work, and agreed to pay the reasonable value thereof,

[97] McClain v. Hutton, 131 Cal. 132, 63 Pac. Rep. 182, 61 Id. 273.

[98] McClain v. Hutton, 131 Cal. 132, 63 Pac. Rep. 182, 622, 61 Id. 273.

[99] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 80 Pac. Rep. 74.

Washington. An allegation that the labor was done at the request of the owner is equivalent to a statement that he was employed by him, and is sufficient: Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 421.

[100] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 595, 25 Pac. Rep. 747.

[101] Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 353, 354.

and that such reasonable value "of said labor and materials so done and furnished" was a sum mentioned, it is sufficient.[102]

§ 384. **Same. "Causing" improvement.** When the name of the employer or purchaser cannot be determined from the claim, in accordance with the rules set forth in the preceding sections, at least by necessary inference, it is ineffectual. Thus a statement in a claim that W. caused the construction of a dwelling-house is not in any sense a statement of the name of the person by whom the plaintiff was employed, and is insufficient.[103]

§ 385. **Same. Name of agent.** Under and subject to the rules laid down in the preceding sections, it is not necessary to set forth the name of a mere agent, if the character of the liability which the claimant intends to assert against the owner or his property otherwise sufficiently appears from the claim of lien.[104]

[102] Newell v. Brill, 2 Cal. App. 61, 63, 83 Pac. Rep. 76.

Insufficient statement of claim. It is insufficient where the claim of the material-man, after stating that the claimant had furnished materials which were actually used in the construction of the building, stated that P. is the name of the contractor, who, on or about the first day of March, 1894, as such contractor, and as agent of the owner, K., entered into a verbal contract with said M. Co., a corporation, by which said P. was to furnish materials for the construction of said building; for such a statement does not show that plaintiff furnished any materials to the contractor, but is consistent with their having been furnished to some other person from whom the contractor obtained them: Madera F. & T. Co. v. Kendall, 120 Cal. 182, 183, 52 Pac. Rep. 304, 65 Am. St. Rep. 117. See Newell v. Brill, 2 Cal. App. 61, 63, 83 Pac. Rep. 76.

[103] Wood v. Wrede, 46 Cal. 637. The court adds that it could not have been intended as such.

Oregon. See Leick v. Beers, 28 Oreg. 483, 43 Pac. Rep. 658.

Naming person causing improvement insufficient. Where the claim states that "by virtue of a contract heretofore made with W. W. Rose, . . . in the erection, material furnished, and labor on a certain dwelling-house, the ground upon which said house was built and erected being at the time the property of Mattie Rose, wife of W. W. Rose, who caused said dwelling-house to be erected and built," it is insufficient in this respect: Barton v. Rose, 85 Pac. Rep. 1009.

[104] **In connection with this matter,** the supreme court has said: "The case of McDonald v. Backus, 45 Cal. 262, contains the statement . . . that the notice of lien is required to state facts, and not mere conclusions of law. This was said to show that a notice of lien was sufficient if it gave the name of one member of the firm by which the claimant was employed, omitting the other members, and not giving

§ 386. Same. Two or more employers or purchasers. A claim was held valid against two tenants who erected a build-

the firm name. Possibly that case was correctly decided. We express no opinion as to it. But we do not think that the broad statement as to conclusions of law can be maintained. According to it, if the owner sends his office-boy to order repairs upon a building, and the boy simply tells the laborer to make the repairs, without saying for whom, the notice of lien must give the name of the office-boy as that of the person by whom he was employed. And the result would be similar if the person who sent for the laborer was himself a contractor. What good would it do for the claimant to put in his notice the name of the contractor's office-boy, or that of any chance messenger, — say an American District Telegraph boy, — as that of the person by whom he was employed? The word 'employed' is not appropriate in such a connection. Nor is there anything in the nature of the case which would give such a meaning to the word. In our opinion, the intention was that the claimant should put enough in his notice of lien to enable the owner to understand whether the claimant was an original or a sub contractor; in other words, whether the claimant asserted that he contracted with the owner and had a personal claim against him, or whether he contracted with the contractor, and looked only to him and the property. The rights and duties of the two classes of claimants are materially different in several respects, and it is important for the owner to know which attitude the claimant assumes. But we should prefer not to lay down any rule about facts and conclusions of law": Malone v. Big Flat G. M. Co., 76 Cal. 578, 584, 18 Pac. Rep. 772.

See "Contents in General," § 370, ante.

As to contractual relation, see §§ 390 et seq., post. **Compare:** §§ 374 et seq., ante.

As a matter of strict pleading, a contract made by an agent should, perhaps, be alleged to have been made by the principal; but no such recognition of the maxim, "That which is done by another, he himself does," is requisite to the validity of a claim, and where the claim contained a statement that the owner agreed to pay the amount agreed to be paid for the work and materials, and that S. was the name of the contractor, who, "as such contractor, and as agent for and on behalf of said T. (defendant), entered into a contract with said M. (plaintiff), under and by which" the work was done and materials furnished, the words "as a contractor" are surplusage, and the claim is not vitiated thereby: McIntyre v. Trautner, 63 Cal. 429, 430. See Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248 (transcript).

In Hooper v. Flood, 54 Cal. 218, 221, the claim stated that the "said materials were furnished to A. F. for and as the agent of the said J. L.," and it was found by the court that A. F. was the contractor. No question seems to have been raised on the lien.

In Arata v. Tellurium G. & S. M. Co., 65 Cal 340, 341, 4 Pac. Rep. 195, the claim stated that "I. L. is the name of the agent and superintendent of said mining company, and . . . as such agent and superintendent entered into a contract with claimant": held, sufficient. See Madera F. & T. Co. v. Kendall, 120 Cal. 182, 183, 52 Pac. Rep. 304, 65 Am. St. Rep. 117.

Colorado. See Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519 (name of contractor, where contractor filed claim, not required, under act of 1883).

Oregon. "Where a lien is claimed against the property of one person, for materials furnished to and on account of another, the

ing upon leased ground, even though it appeared upon the face of the claim that the original charge was against one of them alone, and that the claimant did not know at the time that the other tenant was interested in the building, and that they were copartners, but learned the facts in the case before the claim of lien was filed.[105] Where the claim states that the materials were furnished to H., and that claimants

law requires the notice of the lien to state the name of the person to whom they were furnished; but where a lien is sought against the property of a person with whom the contract was made, and to whom the materials were furnished, it is sufficient to give the name of the owner as the person to whom they were furnished, although in fact they may have been ordered or received by an agent or employee of such owner. In such case, the act of the agent is the act of the principal": Allen v. Elwert, 29 Oreg. 428, 433, 44 Pac. Rep. 823, 48 Id. 54.

In Osborn v. Logus, 28 Oreg. 302, 320, 37 Pac. Rep. 456, 38 Id. 190, 42 Id. 997, it was held that the expression, "the name of the person to whom he furnished the materials," did not require that the contractual relations existing between the lien claimant and the owner should be stated; and the cases of Rankin v. Malarkey, 23 Oreg. 593, 32 Pac. Rep. 620, 34 Id. 816; Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67, and Willamette S. M. L. & M. Co. v. McLeod, 27 Oreg. 272, 40 Pac. Rep. 93, holding to the contrary, are **overruled** as not being stare decisis.

The Washington cases of Warren v. Quade, 3 Wash. 750, 29 Pac. Rep. 827, and Heald v. Hodder, 5 Wash. 677, 32 Pac. Rep. 728, were rejected as authority. See Washington note, § 391, post. See also Cross v. Tscharnig, 27 Oreg. 49, 39 Pac. Rep. 540.

In Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67, the claim set forth that the claimant had furnished materials which were used in constructing a certain building, "and that the materials so furnished to said S. and used in said building" consisted of, etc.; held, that it sufficiently states that the materials were furnished to S.

So where the claim reads: "I, R., have, by virtue of a contract made with H., with K. and H., his contractors and agents, furnished materials and done work in plastering," the contractor being the agent of the owner under the statute, and the meaning being made plain by transposing some of these words: Rowland v. Harmon, 24 Oreg. 529, 34 Pac. Rep. 357. And see Nottingham v. McKendrick, 38 Oreg. 495, 57 Pac. Rep. 195.

Washington. Where the claim states that the materials were furnished at the request of a certain person, as agent of B., as agent for eight others, it is insufficient for failing to show authority to bind such alleged principal: Northwest B. Co. v. Tacoma S. B. Co., 36 Wash. 333, 78 Pac. Rep. 996 (under 2 Ballinger's Ann. Codes and Stats., § 5900).

[105] West Coast L. Co. v. Apfield, 86 Cal. 335, 341, 24 Pac. Rep. 993. It will be noticed in this case, however, that there was a statement of the persons to whom the materials were furnished. The court say: "The defendant was not misled or prejudiced by reason of the claimant stating the whole fact in its notice of lien." And, on the other hand, in Tibbetts v. Moore, 23 Cal. 208, 215, under the statute of 1856, as amended, which did not require the claim of lien to

were employed by both H. and A. to furnish the same, it is sufficient; and it is no variance if the evidence shows that the materials were furnished to H., the contractor, and that N., the owner, originally contracted for them, and H., by giving an order for the payment, admitted his liability to pay for them, no injury having resulted to the owner.[106] But the claim is insufficient if it gives the names of several persons to whom different portions of the materials were furnished at different times, without any designation of what portion was furnished to each severally.[107]

contain any names, it was held that where the claim states that the materials were furnished to A. & Co., when in fact they were furnished to A., this does not invalidate the lien.

Leasehold estate subject to mechanics' liens: See 2 Am. & Eng. Ann. Cas. 687, 3 Id. 1096.

Same. Surrender by tenant will not defeat lien: 3 Am. & Eng. Ann. Cas. 1098.

Oregon. See Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Id. 190, 42 Id. 997, citing Tibbetts v. Moore, supra.

[106] Reed v. Norton, 90 Cal. 590, 595, 26 Pac. Rep. 767, 27 Id. 426, and see Davis v. Livingston, 29 Cal. 283, 289.

See "Materials Furnished," § 87, ante; "Notice," §§ 486 et seq., post.

In Arata v. Tellurium G. & S. M. Co., 65 Cal. 340, 341, 4 Pac. Rep. 195, the claim stated that "I. L. is the name of the agent and superintendent of said mining company, who, on or about the tenth day of November, 1882, as such agent and superintendent, entered into a contract with said E. A. K.," etc.; and it was held sufficient.

In Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248, the transcript shows that the claim of lien stated: "That T. & G. are the names of the contractors, who, on or about . . . as such contractors, and agents of said owners, entered into a contract with said Slight, under and by which said Slight was to perform certain labor and furnish certain materials therefor" (giving a statement of the terms, time given, and conditions of the contract), "and that said contract has been fully performed on the part of said Slight": held a sufficient statement of the names of the persons by whom the claimant was employed and to whom he furnished the materials.

New Mexico. Where the claim stated, "Claimant was employed to do said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn, as president"; held, sufficient: Ford v. Springer L. Assoc., 8 N. M. 37, 52, 41 Pac. Rep. 541.

Washington. A claim which states that the claimant was employed by two persons as contractors on the building, when in fact one was but a subcontractor, will not invalidate the lien, especially in view of the fact that the claimant had been told by both that they were contractors for the erection of the building: McHugh v. Slack, 11 Wash. 370, 39 Pac. Rep. 674.

[107] Gordon H. Co. v. San Francisco & S. R. R. Co. (Cal., Oct. 4, 1889), 22 Pac. Rep. 406 (this is a strict construction of the statute).

Colorado. A claim of lien failing to state that a certain portion of the materials for which the lien was claimed was furnished by the claimant is insufficient as to such portion: Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107.

§ 387. **Terms, time given, and conditions of contract. In general.** The statute, in many jurisdictions,[108] provides that a claim shall be filed, containing a "statement of the terms, time given, and conditions of his contract."[109]

The exact meaning of some of these words does not seem to have been carefully defined in the California decisions. They appear to be used in the statute in a sense different from that of "demand."[110]

§ 388. **Same. Object and construction of provision.** It has already been seen that the general object of the claim of lien, so far as furnishing notice to others is concerned, is to inform the owner primarily of the claim, in order that he may protect himself in his dealings with others,[111] this being particularly the purpose of this provision;[112] and if no

[108] See **Kerr's Cyc. Code Civ. Proc.**, § 1187.

[109] Hooper v. Flood, 54 Cal. 218, 221; Wilson v. Nugent, 125 Cal. 280, 283, 57 Pac. Rep. 1008; Nofziger Bros. L. Co. v. Shafer, 2 Cal. App. 219, 220, 83 Pac. Rep. 284.

See, generally, §§ 370 et seq., ante, and "Variances," §§ 835 et seq., post.

Idaho. White v. Mullins, 3 Idaho 434, 31 Pac. Rep. 801 (under Rev. Stats., § 5130).

Washington. See United States S. L. & B. Co. v. Jones, 9 Wash. 434, 37 Pac. Rep. 666.

Act of 1893. Statement required under. Although it was stated that the act of 1893 did not require a statement of the terms of the contract (Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 317, 39 Pac. Rep. 815), yet subsequent cases seem to hold impliedly that such is necessary. There is evidently a difference, however, between stating the general contractual relation between the parties and stating the terms and conditions of the contract.

The lien law in force when the earlier decisions were rendered was superseded by the statute of 1893, and under this statute it was not necessary to set forth the terms of the contract: Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144.

[110] See §§ 375 et seq., ante.

Washington. Under General Statutes, § 667, requiring a statement of the terms, if any, it seems that the expression was considered as equivalent to the time and method of payment: Fairhaven L. Co. v. Jordan, 5 Wash. 729, 32 Pac. Rep. 729.

A "statement" does not seem to be an "account": See Gates v. Brown, 1 Wash. 470, 473, 25 Pac. Rep. 914.

[111] See § 365, ante.

[112] Wilson v. Nugent, 125 Cal. 280, 283, 57 Pac. Rep. 1008; Wagner v. Hansen, 103 Cal. 104, 37 Pac. Rep. 195.

Washington. The terms and conditions of the contract should also include a sufficient allegation of the materials furnished or work done to enable the owner independently to determine the bona fides of such contract and the reasonableness thereof: Warren v. Quade, 3 Wash. 750, 29 Pac. Rep. 827.

person is misled or deceived by the statement contained in the claim,[113] only a substantial compliance with the statute is required.[114] For these reasons, a claimant can recover only upon the contract set forth in the claim of lien.[115]

§ 389. Same. General rules. The statement of the terms of the contract must be substantially true in all essential particulars; otherwise the claim is ineffectual.[116] The statute does not require the claimant to state what is implied by law.[117] A statement in the claim that the following is a statement of the terms, etc., of the contract must be taken

[113] **Person not being misled:** Newell v. Brill, 2 Cal. App. 61, 62, 83 Pac. Rep. 76; Bryan v. Abbott, 131 Cal. 222, 224, 225, 63 Pac. Rep. 363.

Person misled: Wilson v. Nugent, 125 Cal. 280, 283, 57 Pac. Rep. 1008.

Colorado. For benefit of owner, not being misled: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786.

[114] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74.

[115] San Francisco P. Co. v. Fairfield, 134 Cal. 220, 222, 224, 66 Pac. Rep. 255.

[116] Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497; Wilson v. Nugent, 125 Cal. 280, 283, 57 Pac. Rep. 1008; Nofziger Bros. L. Co. v. Shafer, 2 Cal. App. 219, 220, 83 Pac. Rep. 284 (decided Nov., 1905, before amendment of 1907). The statement in the last two cases, that the claim, in this regard, must be true, that is, absolutely true, goes beyond what reason and authority warrant, especially since the enactment of § 1203a, **Kerr's Cyc. Code Civ. Proc.**

Sufficient statements. Where the statement is that the materials were to be delivered in such quantities as might be directed during the progress of the construction of the building, and that claimant "was to be paid thereafter therefor, on demand of payment as to each delivery of any quantity on said property by him, the reasonable market value thereof," it is sufficient: Snell v. Payne, 115 Cal. 218, 221, 46 Pac. Rep. 1069.

See "Unnecessary Statements," §§ 374 et seq., post.

Colorado. See Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402.

A claim not stating expressly that the materials were furnished by claimant, or by whom they were furnished, may be sufficient: Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107.

Washington. And so where the claim states that the claimants were to furnish material and do the work necessary to the full completion of the painting of the building: Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789. Where the claim of a subclaimant set forth that materials were actually used in the construction of the building, and subsequently that the contract was for materials for the building, this is a sufficient statement that they were furnished to be used in the building: Fairhaven L. Co. v. Jordan, 5 Wash. 429, 32 Pac. Rep. 729.

[117] Jewell v. McKay, 82 Cal. 144, 151, 23 Pac. Rep. 139.

to mean the only terms which were in fact expressly agreed upon.[118]

It cannot be presumed, in the absence of allegation and proof, that the statement and conditions of the contract set forth in the claim did not include all the conditions of the contract.[119]

[118] **Implications of law need not be stated.** "The code does not require the notice to state implications made by law. For example, if there was nothing but a request for labor or materials, and a silent compliance with it, we do not think that a statement of the implied promise to pay what the labor or materials were reasonably worth would be necessary. It seems to us that the statute requires only the agreement which is expressly made to be stated in the notice. . . . We think that the statement that 'the following is a statement of the terms,' etc., of the contract must be taken to mean the only terms which were in fact agreed upon": Jewell v. McKay, 82 Cal. 144, 152, 23 Pac. Rep. 139.

A number of statements of the "terms, time given, and conditions of contracts" are set out in this opinion. See Goss v. Strelitz, 54 Cal. 640, 643; Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 118, 38 Pac. Rep. 635, and see transcript and briefs on file.

Nevada. See Lonkey v. Wells, 16 Nev. 271.

[119] Kelly v. Plover, 103 Cal. 35, 36, 36 Pac. Rep. 1020.

See "Contents," § 370, ante; "Unnecessary Statements," §§ 374 et seq., ante.

And so where the claim states that the "following is a statement of the terms, time given, and conditions upon which said work and labor was performed, to wit, the same was to be paid for in lawful money of the United States when the work was completed," or that "the following is a statement of the terms, time given, and conditions upon which said materials as aforesaid were furnished, to wit, such materials were to be paid for when said alterations and repairs on said building were completed and finished, in lawful money of the United States," these statements must be taken to mean the only terms which were in fact agreed upon: Jewell v. McKay, 82 Cal. 144, 147, 149, 152, 23 Pac. Rep. 139.

Washington. Where the claim set forth, in its statement of the terms of the contract, that the claimant was "to furnish the hardware and other like material" for a certain building, or "to furnish the lumber, sashes, doors, etc., used in the construction of said Lighthouse Block, at the agreed and contract price of $2,449.85," it was held sufficiently definite in that particular, it meaning, in the first instance, "all the hardware to be used in the building": Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099, which attempts to distinguish Tacoma L. Co. v. Wolff, 5 Wash. 264, 31 Pac. Rep. 753, 33 Id. 1055, in which the language employed in the claim was that the claimant should "furnish certain windows, doors, moldings, glass, and lumber for the inside finish of said building," as "there was nothing to indicate that all the windows, etc., were to be furnished under the contract." But in Bolster v. Stocks, supra, it was also held that where the claim stated that the claimants "furnished certain goods, wares, and merchandise, being iron, iron-work, galvanized iron, nails, paints, glass, and other building material, which were reasonably worth and of the value of $1,646.56," it was held to be insufficient, and to fall within the rule

The statement of the terms, time given, and conditions of the contract may appear on the face of the claim to be fatally defective, or it may rest upon allegations and proof to show such defect.[120]

A general statement of the terms, time given, and conditions of the contract, only, is required, and all the details of the contract need not be stated.[121]

of Tacoma Lumber Co. v. Wolff, supra, although there was an itemized statement in the claim, which, however, it was said was indefinite as to quantity, and the item "material in bank-room" did not indicate even the kind of material; but it is there held that the language, "to furnish the hardware and other like material for the construction," etc., means "all the material," and the rule of Tacoma Lumber Co. v. Wolff was characterized as one of "close construction," not to be extended. Where the claim stated that C. promised to pay for the materials sold, at certain prices, upon delivery, and that there was a delivery, and this was the substance of the contract as pleaded and proved, an averment of the answer setting up an agreement to deliver within a certain time, which the plaintiff failed to do, is a matter of defense, and until this defense is established, the contract price is presumed to be as claimed by the plaintiff: Washington M. Co. v. Craig, 7 Wash. 556, 35 Pac. Rep. 413. See Fairhaven L. Co. v. Jordan, 5 Wash. 729, 734, 32 Pac. Rep. 729; Mras v. Duff, 11 Wash. 36, 39 Pac. Rep. 267; United States S. L. & B. Co. v. Jones, 9 Wash. 434, 437, 37 Pac. Rep. 66; Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099.

[120] Jewell v. McKay, 82 Cal. 144, 151, 23 Pac. Rep. 139. See Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74.

Washington. See Mras v. Duff, 11 Wash. 36, 39 Pac. Rep. 267; Tacoma L. & M. Co. v. Kennedy, 4 Wash. 305, 30 Pac. Rep. 79.

[121] **Statement as to improvement.** Where the claim stated that "said house was to be erected, to consist of five rooms, and to be finished in a workmanlike manner, for the agreed price of seven hundred and forty dollars; that, in addition, extra work for the agreed price of five dollars was performed"; the contract having provided for the payment of five hundred dollars as the work progressed, and the balance when the house was finished, — the supreme court said: "The respondent contests the sufficiency of this notice, upon the ground that it does not state that the plaintiff agreed to furnish all the material and labor for the house (except painting), and does not state that the contract price was to be paid in instalments as the work progressed. The provision of § 1187 of the Code of Civil Procedure, that the notice of lien was to contain a statement of the 'terms, time given, and conditions of the contract,' is not to be construed as requiring a statement of all the details of the contract, but is to receive a reasonable construction, in view of the purpose for which it is manifestly required. . . . The present case is not one where the owner is brought into relation with the claimant by reason of labor performed for and materials furnished to another person, of which he has only such knowledge as is given by the notice of lien which is filed. Here the owner contracted for the improvement directly with the person claiming the lien, and therefore had full knowledge of the terms of the contract. It is not contended that the claimant made an erroneous statement of

§ 390. **Same. Showing contractual indebtedness.** Apart from the question of the time of payment, and the other essentials of the claim, the statement required by the provision in relation to the terms, time given, and conditions of the contract is sufficient if it shows that a contract was entered into, and gives such a declaration of its terms as to show the indebtedness claimed.[122] It is not necessary to set forth the contract with as much particularity as in a pleading;[123]

the terms of the contract in his notice of lien, or that there was any time given, or condition thereto, other than as stated in the notice, the claim being that he did not set forth that the contract price was to be paid in instalments as the work progressed. He did, however, state the correct amount of the contract price, and the amount that had been paid thereon, and this exceeded the amount of these instalments. We are of the opinion that this was a substantial compliance with the above provision of § 1187, and entitled him to enforce the lien": McGinty v. Morgan, 122 Cal. 103, 54 Pac. Rep. 392. But see "Purpose of Claim," § 365, ante.

The court, in its reasoning that the claimant contracted directly with the owner, seems to overlook the fact that the claim is filed for the information of other persons than the owner, such as other lien claimants and encumbrancers, who may have no knowledge of the contract except by such claim of lien.

Colorado. A general statement only required: Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402.

[122] McClain v. Hutton, 131 Cal. 132, 137, 63 Pac. Rep. 182, 622, 61 Id. 273.

[123] **Showing as to quantity, time, value, etc.** In this connection the supreme court has said: "There are many contracts which deal with details of quantity, time, value, etc. But even with regard to such contracts it seems questionable whether it is necessary for the notice of lien to set forth items. Even in a pleading 'it is not necessary for a party to set forth the items of an account therein alleged': **Kerr's Cyc. Code Civ. Proc.,** § 454. And we cannot think that the statements in a notice of lien are required to be made with greater fullness or formality than is necessary in a pleading. We are not prepared to say that as much fullness or formality is required. And it seems probable that even in the case of a contract which went into details of amount, etc., a general statement thereof would be sufficient in the notice of lien. But it is not necessary to express a definite opinion upon this question; for it is obvious that there are many contracts which do not go into details of amount, time, value, etc. For example, a contractor may go to the owner of a lumber-yard and say, 'I am building such and such a building. Will you let me have lumber for it as I need it, at ruling rates?' If this should be agreed to, and the lumber supplied, without anything further being said, it seems plain that an itemized account would not be involved in a statement of the 'terms, time given, and conditions of the contract.' So if a laborer should be employed at a fixed rate for an indefinite period, the number of days he worked would not be a part of the contract, and consequently would not have to be stated in the notice. So if he should be employed without a fixed rate of compensation, such compensation could not be said to be a part of the 'terms, time given, or conditions' of the contract": Jewell v. McKay, 82 Cal. 144, 151, 23 Pac. Rep. 139.

and, of course, where the statement of the contract would be sufficient as a complaint in indebitatus assumpsit, it is sufficient.[124]

§ 391. **Same. Setting out terms of original contract.** The expression "his contract" refers to the contract of the claimant under which he performed the labor or furnished the materials; and, of course, in the case of the original contractor, the terms, time given, and conditions of the original contract must be set forth; but in the case of subclaimants, no reference to such original contract in the claim of lien is necessary.[125]

[124] McClain v. Hutton, 131 Cal. 132, 136, 63 Pac. Rep. 182, 622, 61 Id. 273.

[125] See Newell v. Brill, 2 Cal. App. 61, 62, 83 Pac. Rep. 76.

Colorado. The terms and conditions of the subcontractor's contract should be set out by him: Harris v. Harris, 9 Colo. App. 211, 47 Pac. Rep. 841; but he is not required, under this language, to set out the contract of the original contractor with the owner: Harris v. Harris, 9 Colo. App. 211, 47 Pac. Rep. 841; nor refer to the original statutory contract: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786.

A statement that "on or about the tenth day of July said John H. Harris, the owner, agreed with claimants that if they would do the plastering and furnish materials therefor, he would pay claimants the sum of two hundred and fifty dollars," if proven, will show an original contract between the claimant and the owner: Harris v. Harris, 18 Colo. App. 34, 69 Pac. Rep. 309.

New Mexico. Subcontractor is not required to set out the terms of the original contract: Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

Utah. Claim of subcontractor need not state the terms of the original contract, but only the terms, time given, and conditions of his own contract: Brubaker v. Bennett, 19 Utah 401, 57 Pac. Rep. 170 (under Rev. Stats., § 1386). See, generally, Morrison M. Co. v. Willard, 53 Pac. Rep. 832, where it is held that the claim "should contain and set out, so far as the claimant is able to ascertain and disclose it, the contract between the owner and the contractor," since the lien of the subcontractor depends upon the terms of the original contract. This is not in line with the better reasoning of the cases holding the opposite rule. But see reasoning in Morrison v. Inter Mountain S. Co., 14 Utah 201, 46 Pac. Rep. 1104.

Washington. Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001 (under 2 Ballinger's Ann. Codes and Stats., § 5904). See "Unnecessary Statements," § 374, ante, Washington note. As to terms and conditions of the contract, see United States S. L. & B. Co. v. Jones, 9 Wash. 434, 37 Pac. Rep. 666. It was held not sufficient to show that the work was performed and materials furnished under a subcontract, but the terms and conditions of such subcontract should be shown: Gates v. Brown, 1 Wash. 470, 474, 25 Pac. Rep. 114 (1881).

As to necessity of subclaimant showing contractual relation between the owner and the employer, see Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571; McHugh v. Slack, 11 Wash, 370, 39 Pac. Rep.

§ 392. Same. Reference to other papers. A reference in a claim to a valid filed statutory original contract, for certain of the terms, time given, and conditions of the contract, — for instance, the times when payments become due, — does not render it invalid, simply because it does not repeat the provisions of the original contract, as all parties

674; Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 316, 39 Pac. Rep. 815.

The contractual relation between the owner and contractors is sufficiently stated by averring, after stating the name of the owner and that she caused the building to be erected, that certain persons named are the contractors for the construction of said building: Sautter v. McDonald, 12 Wash. 27, 40 Pac. Rep. 418.

A claim which sets out that S. is the name of the owner and reputed owner of said premises, "and caused said building or structure to be built and erected; that R. is the name of the contractor, who, as such contractor, made and entered into a contract with C., under and by which hardware was to be furnished for said building, sufficiently states the relation of principal and agent between the owner and contractor": Collins v. Snoke, 9 Wash. 566, 38 Pac. Rep. 161 (under Gen. Stats., § 1667); Sautter v. McDonald, 12 Wash. 27, 31. In the former of the two cases last cited, it was said: "In Warren v. Quade, 3 Wash. 750, 29 Pac. Rep. 827, it was held that a notice is defective which shows that the goods were furnished to, or labor performed for, a person named in the notice, and not to or for the owner directly, when the notice fails to show such a relation existing between the person to whom they were furnished and the owner as will bind the owner under the lien laws. This doctrine, of course, cannot be gainsaid; but in that case it nowhere appeared in the notice that the defendant and the owner had any contractual relations whatever with the parties who constructed the building. . . . It would be idle for the notice to state, in terms, that R. was the agent of S.; for it is the law, and not the agreement of the parties, which makes the agent, and the notice would not obtain any additional strength by stating a conclusion of law." And it was also said: "While this court would not be inclined to give the lien statutes more strict construction than was given in Warren v. Quade, supra, and in the subsequent decisions which were governed by it, we think it is not necessary to relax the rule there laid down, to sustain the notice in this case."

In Fairhaven Land Co. v. Jordan, 5 Wash. 729, 732, 32 Pac. Rep. 729, the case of Warren v. Quade, supra, was also distinguished, by saying that in the latter case the claim stated the name of the owner of the land and that another person was his contractor, but did not allege the contractual relation between the two, whereas in the former case it also recited that the contractor, as "agent" of the owner, contracted for the materials. The case of Warren v. Quade was also followed in Heald v. Hodder, 5 Wash. 677, 32 Pac. Rep. 728; and both of these cases were criticized in the Oregon and New Mexico cases cited in a note in § 385, ante. In Warren v. Quade, supra, it was also said: "We think that the statement of the terms and conditions of the contract should show that such a relation existed between the firm to which they were furnished and the owner as will bring it within the list of those who, under the lien law, could, for the purposes thereof, bind the owner."

interested can readily ascertain from the record what the contract provides upon that subject.[126] And it seems that where the claim recites that the claimant entered into a contract with the original contractor, under and by virtue of which he was to do all the painting, staining, varnishing, and tinting, and to furnish all necessary materials as specified in the plans and specifications of the building, which were not set out in the claim, it is not fatally defective.[127]

§ 393. **Same. Express and implied agreement as to price.** Where the agreement as to price is express, the price agreed upon must be stated, and it is insufficient if the reasonable value alone be set forth; and, on the contrary, where no express contract is made as to price, a statement of an agreed price only is fatal to the lien.[128] But where the claim states the contract price of the materials, it is not vitiated by the additional statement of the reasonable value thereof.[129]

Statement as to price of labor. Where a claim states that the labor was to be performed " at the usual rates," it is an-

[126] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 577, 27 Pac. Rep. 431.

New Mexico. So a reference to a copy of the contract attached to the claim is sufficient: Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

[127] Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248. The question involved, however, was one of pleading.

Washington. In a similar case it was said: "If it clearly appeared from the statement of the terms of the contract that the plans and specifications were necessary to an understanding thereof, and they were not attached to the notice of lien, nor their substance stated therein, the sufficiency of such notice might well be doubted. . . . Such statement, though only a brief description of such terms and conditions, is sufficient, in the absence of proof, that such brief description is not such as to enable the contract to be fully understood. When the statement is made that the plans and specifications are briefly described as follows, and thereafter are given the terms and conditions, it must be assumed, in the absence of proof to the contrary, that the substance of such plans and specifications is as therein stated. The notice of lien was sufficient, and the complaint stated a cause of action": Mras v. Duff, 11 Wash. 36, 39 Pac. Rep. 267. The statute itself (Laws 1893, p. 32), however, did not expressly require any statement of "the terms and conditions of the contract."

[128] See "Variances," §§ 835 et seq., post.

[129] Neihaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255.

Express price. See Nofziger Bros. L. Co. v. Shafer, 2 Cal. App. 219, 220.

other way of stating "for what it was reasonably worth."[130] And where the claim states that the price agreed upon was "the usual price, and what said materials were reasonably worth at their place of business," it states, in legal effect, that the materials were to be paid for on delivery at what they were reasonably worth; and it is not necessary to prove an express agreement to pay the reasonable worth of the materials.[131]

No statement as to reasonableness of agreed price. Where the lien stated nothing as to the reasonable or other value or agreed price of the work and materials, except the agreed price as to part of the work, and the contract is entire, and the testimony showed that, except as to one item of small

[130] McClain v. Hutton, 131 Cal. 132, 137, 63 Pac. Rep. 182, 622, 61 Id. 273.

Where the claim states that the owner entered into the contract with certain contractors, by which they agreed to erect and finish for him a building on a lot, and that the plaintiff furnished the materials under a contract with the contractors, by which they agreed to pay the market value thereof at the date of delivery, in cash, and the whole value and the balance unpaid are stated, it is a sufficient statement of the terms, time given, and conditions of the contract: Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 595, 25 Pac. Rep. 747. It seems from this decision that the "market value" is equivalent to the "reasonable value."

Market value. See Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497; Buell & Co. v. Brown, 131 Cal. 158, 162, 63 Pac. Rep. 167.

See "Variances," §§ 835 et seq., post.

[131] Reed v. Norton, 90 Cal. 590, 597, 26 Pac. Rep. 767, 27 Id. 426. See La Grill v. Mallard, 90 Cal. 373, 375, 27 Pac. Rep. 294 (claim not set out in opinion or record).

See § 374, ante.

Where the claim sets forth the contract price as "the usual price and what said materials were reasonably worth at their place of business," it is, in effect, a statement of a contract on a quantum meruit; and while it might have been unnecessary to set out such a contract in the claim of lien under the decision in Jewell v. McKay, 82 Cal. 144, 151, 23 Pac. Rep. 139, yet such decision does not announce the principle that where such a course is pursued, a party shall not be held to have filed a claim based upon a quantum meruit: Reed v. Norton, 90 Cal. 590, 597, 26 Pac. Rep. 767, 27 Id. 426. See La Grill v. Mallard, 90 Cal. 373, 375, 27 Pac. Rep. 294 (claim not set out in opinion or record).

See "Evidence," §§ 764 et seq., post.

Washington. Where the claim made reference to a bill of items, setting forth in detail all the materials furnished under the contract for use in the building, together with the reasonable value thereof, no price having been agreed upon, it contains a sufficient statement of the terms of the contract: Washington R. P. Co. v. Johnson, 10 Wash. 445, 39 Pac. Rep. 115.

amount, there was no agreed price for any labor, or labor and materials, it was held that there is a fatal variance as to all.[132]

§ 394. **Same. Items of account.** It seems to be established that, whether the contract for the work and materials is for a sum in gross,[133] or otherwise,[134] it need not set out the items of the account, under this provision of the statute.[135] Where there has been a novation of the original con-

[132] Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195.

[133] Heston v. Martin, 11 Cal. 42 (1855), where the statute required the filing of a just and true account of the demand due him after deducting all proper credits and offsets. See Hicks v. Murray, 43 Cal. 515, 522, dissenting opinion of Crockett, J.

Statement of terms of contract, when sufficient. Where the claim states the time of contract, the material furnished, the agreed price, either in the aggregate, or, in the case of labor, the rate per day and the number of days' labor performed, it is a sufficient statement of the terms of the contract: McClain v. Hutton, 131 Cal. 132, 63 Pac. Rep. 182, 61 Id. 273.

It is sufficient where the claim unequivocally states that the materials furnished were used on a building, the kind of materials furnished, whether stone, iron, etc., or the price of the several items: McClain v. Hutton, 131 Cal. 132, 136, 63 Pac. Rep. 182, 622, 61 Id. 273.

Description of the materials furnished, as "nails, spikes, iron, steel, picks, shovels, and other like material," held to be too indefinite and uncertain to sustain a lien, in Gordon H. Co. v. San Francisco & S. R. R. Co. (Cal., Oct. 4, 1889), 22 Pac. Rep. 406, which must be considered overruled by later decisions.

Hawaii. As to general description of materials being sufficient under an entire contract to furnish all materials for building, see Allen v. Redward, 10 Hawn. 151, 161 (dictum).

Construction of word "material" as used in claim: Allen v. Redward, 10 Hawn. 151, 160.

Washington. It is not necessary to set out the amount for labor and the amount for material, where the contract is in gross: Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789.

[134] **Where claim stated that "labor was performed by the day,** at the agreed price of $2.75 per day, between the first day of August and the twentieth day of September, 1901," on a certain mine described in the claim, and that the amount was justly due and owing, it was held to be a sufficient statement as to the claim of a laborer, nothing being uncertain or in doubt: Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74.

[135] Brennan v. Swasey, 16 Cal. 141, 142, 76 Am. Dec. 507; Selden v. Meeks, 17 Cal. 128 (1862); same language as that construed in Heston v. Martin, supra. See Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 118, 38 Pac. Rep. 635 (transcript and briefs), and Wagner v. Hansen, 103 Cal. 104, 106, 37 Pac. Rep. 195.

See "Demand," §§ 375 et seq., ante.

Sufficiency of statement of claim. Where the claim of lien states that the owner is indebted to the claimant in a certain sum for materials furnished to and used by said owners between certain

tract, it is not necessary for the claimant to segregate the materials furnished to each contractor, in the claim of lien filed, and if the proof segregates the amount furnished to each of them, and no injury can possibly result to the owner, the claim is sufficient.[136]

Amount of entire contract price, if there be any, however, must be truly stated in the claim; for, where the owner is not a party to the contract, he has a right to be informed of the facts upon which the claimant claims a lien upon the property.[137]

§ 395. **Same. Nature of labor.** It has been held that the terms of the contract as to the nature of the labor must be correctly stated in the claim.[138] Thus where, as a matter of

dates, and simply alluded to the fact that the material furnished was lumber, it was held a sufficient statement of the character of the materials and the quantities: Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 354.

See § 375, ante.

Hawaii. Items of account not required: Allen v. Redward, 10 Hawn. 151, 160.

Nevada. Lonkey v. Wells, 16 Nev. 271.

Washington. But see Tacoma L. & Mfg. Co. v. Wolff, 5 Wash. 264, 31 Pac. Rep. 753, 33 Id. 1055, in which it was held that quantities should be specified, and the subclaimant's claim should be sufficiently definite to apprise fairly the owner of what he is charged with, what kind of material, and what the same were furnished for; Tacoma L. & M. Co. v. Kennedy, 4 Wash. 305, 30 Pac. Rep. 79. See also United States Sav. L. & B. Co. v. Jones, 9 Wash. 434, 439, 37 Pac. Rep. 666.

Terms and conditions. Sufficiency of statement of. Where the statute required a "statement" of the terms and conditions of the contract, it was said: "The notice should certainly contain a statement of the terms and conditions of the contract, if founded upon an express contract, and if upon an implied one, then a statement of the full amount, and what for; if for different things, such as labor and materials, then the amount claimed for each, and in all cases a statement of what has been paid to the claimant thereon. We do not decide that it is necessary to give an itemized statement in the notice, where the contract or claim can be fairly understood without it. It would be a better and safer practice so to do, however, especially where the lien is claimed by any one other than the original contractor": Gates v. Brown, 1 Wash. 470, 25 Pac. Rep. 914.

[136] Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 619, 25 Pac. Rep. 124; Gordon H. Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 623, 25 Pac. Rep. 125.

[137] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 381, 51 Pac. Rep. 555; but, as before stated, other lien claimants are interested in knowing the facts.

[138] See "Nature of Labor," §§ 130 et seq., ante.

fact, the work is "to raise up, move back, and repair" two houses, and furnish material therefor, and the claim is uncertain as to whether it is a contract to "erect" and furnish materials for one or two buildings, the claim is insufficient.[139] Where the claim of lien states that the claimant "was to do the carpentering-work on said building or structure known as a quartz-mill, as aforesaid, for wages, at three dollars per day, and said wages were payable on demand," it is a sufficient statement, under these facts.[140]

§ 396. **Same. Dates.** While it is not thought to be necessary to set forth the date of the contract,[141] where dates between which materials were furnished are stated in the claim,[142] or where the date is mentioned, but is left uncertain, as, "on or about the first day of July," the claimant cannot recover for materials furnished on the 24th of May of the same year;[143] the general principle being, that, while items of an account are, in general, not required, still the claimant cannot recover for materials not included in the claim of lien.[144]

[139] Eaton v. Malatesta, 92 Cal. 75, 28 Pac. Rep. 54, **distinguished** in Ward v. Crane, 118 Cal. 676, 677, 50 Pac. Rep. 839, where the claim, complaint, evidence, and findings all showed the work to be the "erection" of a building, although the work consisted in practically remodeling the building.

See § 411, post.

[140] Corbett v. Chambers, 109 Cal. 178, 179, 185, 41 Pac. Rep. 873 (see record); Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 332, 80 Pac. Rep. 74. Held sufficient, where claim stated that the labor was performed by the day, on a certain mine described, at the agreed price of $2.75 per day, between August 1 and September 20, 1901, and that the amount is justly due and owing.

[141] See § 374, ante.

[142] Goss v. Strelitz, 54 Cal. 640, 644.

Montana. Time of furnishing materials, when shipped: See McEwen v. Montana P. & P. Co. (Mont.), 90 Pac. Rep. 359.

Oregon. Contra: Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Id. 54.

[143] See Santa Monica L. & M. Co. v. Hege (Cal.), 48 Pac. Rep. 69. The opinion on rehearing, however, did not consider this point. See s. c. 119 Cal. 376, 51 Pac. Rep. 555.

See "Uncertainty," § 411, post.

[144] Goss v. Strelitz, 54 Cal. 640, 643; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860.

Oregon. But where the claim contains a lumping charge of the amount demanded, and there is no means of ascertaining from the claim itself the quantity and value of non-lienable claims, the lien is defeated: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep.

§ 397. **Same. "Time given."** [145] The expression, "time given," as used in the provision of the statute requiring the "terms, time given, and conditions" of the contract to be stated, refers to the time of payment as agreed on and expressed in the contract of the claimant. If no time of payment is stated in the contract, it is presumed that no time was given.[146] The law construes such contract as requiring payment upon completion of claimant's contract; and no time need be stated in the claim of lien.[147]

390; Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Id. 54. See Dalles L. & Mfg. Co. v. Wasco W. Mfg. Co., 3 Oreg. 527; Kezartee v. Marks, 15 Oreg. 529, 16 Pac. Rep. 407; Williams v. Toledo Coal Co., 25 Oreg. 426, 36 Pac. Rep. 159, 42 Am. St. Rep. 799.

Reason for the rule. "For a court cannot from oral evidence separate items for which a lien is given from those for which no lien can be acquired": Harrisburg L. Co. v. Washburn, supra.

Utah. Likewise as to statement, under § 12, of intention to perform labor or furnish material: Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238 (1890).

[145] See, generally, §§ 387 et seq., ante.

Colorado. "Even if the debt had not matured, by reason of credit having been extended for a specific time, this would not, as is well known, have destroyed the right of the creditor to secure himself by initiating a lien": Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 343, 51 Pac. Rep. 519 (1889).

Washington. See Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 317, 39 Pac. Rep. 815.

[146] McClain v. Hutton, 131 Cal. 132, 137, 63 Pac. Rep. 182, 622, 61 Id. 273.

[147] **When no time of payment was stated** in the contract, the law construed the contract to require payment upon the completion of the work, and therefore the time of payment, although not the date, is fixed: Bryan v. Abbott, 131 Cal. 222, 224, 225, 63 Pac. Rep. 363.

"Time given." In reference to this expression, the supreme court has said: "The words of the statute, 'time given,' in our judgment, mean the time of payment for the work and labor performed and materials furnished, as agreed on and expressed in the contract. As said above, we cannot say that the contract is not accurately stated; that is, stated as made and agreed on. If this is so, no distinct time was agreed on, but the time of payment was left to the rule fixed by the law on such a state of facts. When this is the case, no time is given, in contemplation of law, and the requirement that the 'time given' must be stated does not apply. If the words 'time given' refer to the time agreed on for the completion of the contract, and no period of time for such completion is fixed by the contract, but such time is allowed as the law gives, the same rule applies, and no time need be stated in the claim": Hills v. Ohlig, 63 Cal. 104. See Jewell v. McKay, 82 Cal. 144, 152, 23 Pac. Rep. 139; California P. W. v. Blue Tent Consol. H. G. M. (Cal.), 22 Pac. Rep. 391. But see Hooper v. Flood, 54 Cal. 218, 221.

Statement of claim is sufficient where the statement is that the price of all the materials furnished shall be due on the delivery of the same: Cohn v. Wright, 89 Cal. 86, 89, 26 Pac. Rep. 643.

Partial payments. Where the claim of lien states that the amount of partial payments was not fixed in the contract, the claimant could not insist, under such contract, upon any specified sums being paid before the final payment became due after the completion of the contract, when all became due; and such statement of claim seems to be a substantial compliance with the statute.[148]

§ 398. **Same. "Cash."** Where the claim states "that the terms, time given, and conditions of said contract are and were cash," the court said that the word "cash," in this connection, means nothing; that its common meaning is "money," and sometimes "ready money"; and that the word "credit," similarly placed, would throw as much light on the subject.[149] But where the claim states: "The following is a statement of the terms, time given, and conditions of said contract, to wit: 50 M. 1½ P. Laths, one hundred and seventy-five dollars, [stating each item of the claim]; terms cash on completion of contract," — the time and manner of payment are expressed, and it cannot be presumed, in the absence of allegation and proof, that this did not include all the conditions of the contract.[150] Likewise, it is sufficient where the claim contains the statement, "that the terms of payment for said labor were cash as soon as said labor was performed"; [151] or, "cash upon demand, in gold coin of the United States"; [152] or, an agreement to pay the market value at the date of delivery, "in cash." [153]

[148] San Diego L. Co. v. Woolredge, 90 Cal. 574, 578, 27 Pac. Rep. 431, 432.

[149] Hooper v. Flood, 54 Cal. 219, 221; but the opinion does not show whether the word "cash" was actually used in the contract, or whether there was any time actually given. See also Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 118, 38 Pac. Rep. 635 (transcript and briefs).

[150] Kelly v. Plover, 103 Cal. 35, 36, 36 Pac. Rep. 1020.

[151] Tredinnick v. Red Cloud M. Co., 72 Cal. 78, 80, 13 Pac. Rep. 152. See Kelly v. Plover, 103 Cal. 35, 36, 36 Pac. Rep. 1020.

[152] Blackman v. Marsicano, 61 Cal. 638, 640, **distinguished** from Hooper v. Flood, 54 Cal. 219, 221; and see Kelly v. Plover, 103 Cal. 35, 36 Pac. Rep. 1020.

[153] Russ L. Co. v. Garrettson, 87 Cal. 589, 595, 25 Pac. Rep. 747 (the statement also showed the whole value of the materials furnished and the balance unpaid).

§ 399. Description of property. In general.[154] The code provision,[155] like the mechanic's-lien statutes generally, provides that the claim of lien must contain a "description of the property to be charged with the lien, sufficient for identification." Where the claim contains no description of the property upon which a lien is sought to be foreclosed, although the intention was manifest, the omission is fatal;[156]

[154] **Generally,** see Georges v. Kessler, 131 Cal. 183, 63 Pac. Rep. 466; Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1078.

As to description of property in claim, see note 11 L. R. A. 740.

Oklahoma. See El Reno E. L. & T. Co. v. Jennison, 5 Okl. 759, 50 Pac. Rep. 144.

Utah. See Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85.

[155] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[156] Penrose v. Calkins, 77 Cal. 396, 19 Pac. Rep. 641.

Under statute requiring "correct" description (1855), the following was held not sufficient: "A dwelling-house lately erected by me for J. W. Conner, situated on Bryant Street, between Second and Third streets, in the city of San Francisco, on lot ——." "This is not such a description," said the court, "as is contemplated by the statute; there are a number of lots on Bryant, between Second and Third streets, to any one of which it would apply, as well as the one in question. The fact that Conner owned no other dwelling on Bryant Street, we think immaterial; besides, it does not appear from plaintiff's notice, nor is it shown, that Payson, who is an innocent purchaser for a valuable consideration, was aware of it": Montrose v. Conner, 8 Cal. 344, 347. See Tibbetts v. Moore, 23 Cal. 208, 213.

And also where the owner refers to any real estate in the claim of lien, as follows: "That certain lot and parcel of land situated in said county of Nevada, state of California, and sought to be charged with this lien, as follows, to wit," and this was not followed by a particular description, it was held to be absolutely no description of the property: Penrose v. Calkins, 77 Cal. 396, 19 Pac. Rep. 641.

Colorado. And so where no state, county, or city was mentioned ("plat 2, in block 13, of Harman's Subdivision"): Sayre-Newton L. Co. v. Park, 4 Colo. App. 482, 36 Pac. Rep. 445. See Anderson v. Bingham, 1 Colo. App. 222, 28 Pac. Rep. 145.

Montana. A description in the notice of lien cannot be supplied by oral evidence, but an ambiguity may be explained and the premises identified. Hence a description of lot 14 cannot sustain a lien for material furnished for the erection of a building on lot 13, although the particular description is preceded by a reference to "that certain frame building and outhouses erected" upon the same, and it is alleged that lot 13 is the only one upon which defendant had buildings. Some stress was laid on the custom of describing land in cities by lots, according to some recorded plat: Goodrich L. Co. v. Davie, 13 Mont. 76, 32 Pac. Rep. 282 (under Comp. Stats., § 1371).

Oregon. Morehouse v. Collins, 23 Oreg. 138, 31 Pac. Rep. 295.

Washington. See Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 316; Warren v. Quade, 3 Wash. 750, 29 Pac. Rep. 827 (Gen. Stats., § 1667); Tacoma L. & M. Co. v. Kennedy, 4 Wash. 305, 30 Pac. Rep. 79; Mount Tacoma M. Co. v. Cultum, 5 Wash. 294; Young v. Howell, 5 Wash. 239, 31 Pac. Rep. 629.

but the courts have been very liberal in upholding imperfect descriptions.[157]

Before the enactment of section twelve hundred and three a,[158] the statute did not even require a technical description, but only one "sufficient for identification."[159]

[157] Penrose v. Calkins, 77 Cal. 396, 19 Pac. Rep. 641.

Colorado. Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744.

[158] **Kerr's Cyc. Code Civ. Proc.,** § 1203a.

[159] Brunner v. Marks, 98 Cal. 374, 375, 377, 33 Pac. Rep. 265; Curnow v. Happy Valley B. G. & H. Co., 68 Cal. 262, 266, 9 Pac. Rep. 149; Tredinnick v. Red Cloud Consol. M. Co., 72 Cal. 78, 81, 13 Pac. Rep. 152; Fernandez v. Burleson, 110 Cal. 164, 167, 42 Pac. Rep. 566, 52 Am. St. Rep. 75. See Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1079. The statement in this case, that "what the statute has made essential to the creation of the lien must be fully and correctly stated," is subject to criticism, so far as the description is concerned, since the statute expressly states that a description sufficient for identification only is required: See s. c. (Cal. Sup.) 89 Pac. Rep. 1081.

"Correct" description. Under some early statutes the claim was required to contain a "correct description" of the property, and the decisions upholding descriptions under this rule would undoubtedly be applicable under our present statute requiring only a description "sufficient for identification." The rule was early stated, that a description is sufficient if the land is described with convenient certainty: Hotaling v. Cronise, 2 Cal. 60, 64 (in this case the claimant described the property as "the wharf situated on Battery Street, between Pacific and Jackson streets, in San Francisco," and was held sufficient).

Under an early statute, which required a "correct" description of the property, in Gordon v. South Fork C. Co., 1 McAl. C. C. 513, 10 Fed. Cas. 817, it is said: "What is meant by a correct description? Does it mean a description by metes and bounds, and require the particularity demanded in a deed? The word 'correct' is not a technical one. Its obvious meaning, under the statute, is, such a description as identified the individual object intended to be designated. If there was no other object in existence at the time which answered that description, the rule, De non apparentibus, etc., must apply, and the description must be deemed sufficiently correct. Such object is accomplished in this case. . . . The subject on which the lien is sought are 'the works known as the South Fork Canal, near Placerville, in Eldorado County.'" And if an act uses the word "correct" description or not, it seems to make no difference.

Colorado. Sayre-Newton L. Co. v. Park, 4 Colo. App. 482, 36 Pac. Rep. 445.

Montana. Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 416.

Under the statute in force it was held not necessary to describe the "property," but the land: Whiteside v. Lebcher, 7 Mont. 473, 17 Pac. Rep. 548.

New Mexico. Ford v. Springer Land Assoc., 8 N. M. 37, 41 Pac. Rep. 541 (legal subdivisions according to United States surveys, etc., sufficient).

Oregon. Where the building is described sufficiently for identification, such building will be bound, although the land may not be described: Kezartee v. Marks, 15 Oreg. 529, 536, 16 Pac. Rep. 407.

§ 400. **Same. Bona fide purchasers.** The California courts, with some hesitation, announced the doctrine that the description of the property must be sufficient not only as to the owner, but also as to bona fide purchasers and all other persons who might be interested; in other words, the description must be sufficient in itself as notice to any and all parties likely to become interested in the property.[160]

Statutory provision. To render the rule definite and create an exception where the rights of bona fide purchasers intervene, a new section, added to the California Code of Civil Procedure in 1907,[161] provides: "No mistakes or errors . . . in the description of the property against which the claim is filed, shall invalidate the lien, unless . . . the court shall find that the innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner." [162]

§ 401. **Same. Object of provision.** The requirement of the statute must be looked at in the light of its purpose, and the object of the description is, of course, to affect with notice the owner, creditors, purchasers, and other lien claimants dealing with the land or property affected by the lien.[163]

Washington. Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571; McHugh v. Slack, 11 Wash. 370, 373, 39 Pac. Rep. 674; Whittier v. Stetson & P. M. Co., 6 Wash. 190, 192, 33 Pac. Rep. 393, 36 Am. St. Rep. 149 (Gen. Stats., § 1667). See Collins v. Snoke, 9 Wash. 566, 570, 38 Pac. Rep. 161.

[160] In Union L. Co. v. Simon (Cal. Sup.), the supreme court, on hearing in bank, from s. c. (Cal. App., March 13, 1906) 89 Pac. Rep. 1077, did not agree to an intimation contained in the opinion of the lower court, that a misdescription of one boundary, sufficient as to the owner, may be void as to third persons without knowledge of the extrinsic facts, but held that it must be good as to all persons (Henshaw and McFarland, JJ., dissenting).

[161] **Kerr's Cyc. Code Civ. Proc.,** § 1203a, **Kerr's Stats. and Amdts. 1906-07,** p. 482.

[162] See "Uncertainty and Error," §§ 411, 412 et seq., post.

[163] See Fernandez v. Burleson, 110 Cal. 164, 167, 42 Pac. Rep. 566, 52 Am. St. Rep. 75; Montrose v. Conner, 8 Cal. 344, 347. See Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1079.

Colorado. Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744.

Montana. The purpose of filing a claim of lien is to notify all parties dealing with the property that a lien is claimed upon it.

§ 402. Same. General rule. As to what constitutes a description "sufficient for identification," the California supreme court has said: "The claimant is not required, before filing his claim of lien, to make an accurate survey of the lot upon which the building stands, at the risk of losing his lien if he makes a slight mistake in giving its boundaries, nor is he even required to give the boundaries of the lot. . . . 'The best rule to be adopted is, that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. There is a great reluctance to set aside a mechanic's claim merely for loose description, as the acts generally contemplate that the claimants should prepare their own papers, and it is not necessary that the description should be either full or precise." [164] Hence the same fullness and precision of

When the building is identified, this notice is given. All persons are charged with the knowledge that the statute gives a lien upon the building, and then extends it to a certain area of the land upon which the building is situated. If the lien claimant were required to describe specifically the land in his claim, he would often, without any fault on his part, be unable to do so. To ascertain the exact description, if outside the limits of a city, would in many instances require a survey, which the owner might object to and prevent. Again, such a requirement, where the structure is outside the limits of a city, would give a right to such claimant to select the land in any shape he desired, and the query would then arise, whether his selection would not be binding on the court and all the parties to the suit. This might render the statute extremely oppressive on the land-owner. If there was more than one claimant, no two selections might coincide. If the tract of land described is of greater area than the statute allows, but is sufficient for identification, the amount and specific description against which the lien should be adjudged is a matter to be tried and determined by the court, which may appoint a surveyor, if necessary, for that purpose: Western L. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 416.

[164] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 209, 29 Pac. Rep. 633. See Fernandez v. Burleson, 110 Cal. 164, 167, 42 Pac. Rep. 566, 52 Am. St. Rep. 75.

Colorado. Martin v. Simmons, 11 Colo. 411, 18 Pac. Rep. 535; Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744 ("wide latitude is allowed in the application of this rule").

Montana. Any description which will enable one familiar with the locality to identify the property upon which the lien is claimed is sufficient: Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 416.

New Mexico. See Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

Oklahoma. Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 305.

description is not required in the claim as in the case of a conveyance or a judgment.[165]

Question of fact. As a general rule, whether the description is sufficient,[166] or "sufficient for identification," is a question of fact.[167]

§ 403. **Same. Special applications. False calls.** A false call or an inaccuracy in the description of the property will not defeat a lien, if the description is not in itself misleading, nor defective in some essential particular.[168]

Description sufficient when it enables one familiar with the locality to identify with reasonable certainty the premises intended to be described: Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

Oregon. Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390; Kezartee v. Marks, 15 Oreg. 529, 16 Pac. Rep. 407.

Washington. Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571. See McHugh v. Slack, 11 Wash. 370, 373, 39 Pac. Rep. 674; Collins v. Snoke, 9 Wash. 566, 571, 38 Pac. Rep. 161; Whittier v. Stetson & P. M. Co., 6 Wash. 190, 194, 33 Pac. Rep. 393, 36 Am. St. Rep. 149; Cowie v. Ahrenstedt, 1 Wash. 416, 420, 25 Pac. Rep. 458.

[165] Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077.

Oregon. Contra: Runey v. Rea, 7 Oreg. 130 (1874), requiring as definite description as in a mortgage or deed.

[166] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 209, 29 Pac. Rep. 633; Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1079.

[167] Corbett v. Chambers, 109 Cal. 178, 185, 41 Pac. Rep. 873 (see "record").

[168] Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077. See Nystrom v. London & N. W. Am. Mortg. Co., 47 Minn. 31, 94 N. W. Rep. 394.

Thus where the description in the claim is "'Lot 6, in block 28, of the Huber tract,' in Los Angeles, . . . said lot was 'situate at the southwest corner of Hope and Eighth streets in said city,'" the description is sufficient, although that lot and block are on the northeast corner of the streets and part of the building is on lot 7, it not appearing that any other building than the one on the northeast corner had been erected by the owner at the intersection of such streets. The description of the block identified the location of the lot, and the call for the "southwest" corner of the streets may be rejected as a false call in a deed of conveyance; the greater portion of the building being in fact upon lot 6, and the building intended was thus sufficiently identified, notwithstanding it extended a short distance beyond the line of division between the two lots. If there had been a building upon each lot, and the plaintiff had stated that the building upon which he claims a lien was upon lot 6, he might have been precluded from enforcing the lien against the one upon lot 7, but in the absence of any ambiguity or uncertainty, the statement must be held sufficient whenever it can be determined from it what building was intended: Willamette S. M. Co. v. Kremer, 94 Cal. 205, 209, 29 Pac. Rep. 633.

Particular description repugnant to general description. A statement that materials were used in the construction "of that certain railway known as and called the Sierra Valleys and Mohawk Railway" (Mohawk Valley, in Plumas County, being its proposed westerly terminus), includes the entire railway, by general description. A further particular description "to its present westerly terminus," particularly described, which was short of its proposed westerly terminus. is not inconsistent with the general description, and the claim includes the incompleted portion, it being a fair inference that the further particulars were intended and could be regarded merely as for identification of the road as an entirety, and not as exclusive of the westerly extension, then incomplete; although such extension was not within the descriptive particulars, yet it was not excluded by them, and was within the descriptive designation, "Sierra Valleys and Mohawk Railway." [169]

Washington. Description of property in notice of claim of mechanic's lien, insufficient when: Whittier v. Stetson & P. M. Co., 6 Wash. 190, 33 Pac. Rep. 393, 36 Am. St. Rep. 149.

As to sufficiency of description of property in notice of claim of mechanic's lien, see note 36 Am. St. Rep. 156.

[169] Bringham v. Knox, 127 Cal. 40, 43, 59 Pac. Rep. 198.

As to mechanic's lien on railroad, see note 7 Am. & Eng. Ann. Cas. 469-472.

Where the claim states that it is the intention of the claimant "to hold and claim a lien . . . upon that certain mining claim situated in the Virginia Bar mining district, county of Siskiyou, state of California, particularly described as follows [giving a specific description by monuments, metes, and bounds], containing twelve acres, more or less, . . . with all improvements, including wheels, pumps, and all mining facilities and appurtenances situated thereon," and Burleson and Parsley are mentioned as the owners thereof, and where "the description by monuments, metes, and bounds, thus stated, does not apply in any part to the 'Bare Bar' property, where plaintiffs did their work, but does apply with entire accuracy to an adjoining mining claim known as the 'Otto Bar,'" in which B. and P. had with other persons some interest, but which was not worked at all at the time the plaintiffs did their work, and there were no pumps, etc., on Otto Bar, and mines in the neighborhood were "generally known by the names of the parties running them," and the Bare Bar claim was commonly called the Burleson and Parsley claim, and mining claims were somewhat numerous in the neighborhood, but Burleson and Parsley worked no other claim, it was said by the court: "There is no warrant in the law, or in the abstract equity of the case, for rejecting the boundaries by which the notice of lien states that the property is 'particularly described.' One of the most important requirements of the statute governing the creation of such liens is that the notice shall contain a description of the property to

Construction of description. A description will be so construed as to reject a recital repugnant to the rest of the claim, when it contains a reference to one building on one lot, and in fact to the building in question.[170]

be charged, sufficient for identification: Code Civ. Proc., § 1187. Without such description, the notice would in some instances be of no value to the owner, and could rarely be of any use to creditors, purchasers, or other lien claimants dealing with the land. If this were a case of mistake as to some incident of the description, the mistaken circumstance, like a false call in a deed, would be rejected: Willamette S. M. Co. v. Kremer, 94 Cal. 205, 209, 29 Pac. Rep. 633; but, on the contrary, the error is of the essence of the description. To reject the particular description, and rely on the adventitious circumstances which accompany it, would be to invert the maxim that the incident follows the principal, and not the principal the incident: Civ. Code, § 3540; the notice of lien is not an instrument susceptible of reformation: Goss v. Strelitz, 54 Cal. 640; therefore the monuments and lines by which the property is said in the notice to be 'particularly described' cannot be expunged from the notice, but must be read as part of it; so read, it is misleading in a particular where it should be substantially true: Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195. Secondly, were the particular description omitted, and the other circumstances stated in the notice alone consulted, we do not think that a person familiar with the locality merely could thereby identify the premises with reasonable certainty, to the exclusion of others; he would also need to know that the claimant worked on the premises, and when he worked there, — knowledge of which matters cannot be implied from mere knowledge of the locality. Besides, the statute requires that the notice itself must describe the property on which the work was done: Code Civ. Proc., §§ 1183, 1187. A notice that the property to be charged is the property where claimant worked does not take the first step toward compliance with the statute. Nothing then remains except the reference to pumps, wheels, and mining facilities, and to the names of the owners; it is shown affirmatively that the defendants claimed and were reputed to own an interest in the 'Otto Bar' mine; and the reference to the wheels, pumps,' etc., is — on our present assumption — to them as situate upon unascertained land. On these facts, at the very most, one might suspect that the 'Bare Bar' mine was intended, but that he could identify it with reasonable certainty, to the exclusion of other premises, is incredible": Fernandez v. Burleson, 110 Cal. 164, 167, 168, 42 Pac. Rep. 566, 52 Am. St. Rep. 75.

[170] McClain v. Hutton, 131 Cal. 132, 138, 63 Pac. Rep. 182, 622, 61 Id. 273 (reference to an additional piece).

Colorado. Where the land was described as being in "Highland Subdivision," instead of "Highland, in the town of Highland," held sufficient, so far as the owner was concerned: Martin v. Simmons, 11 Colo. 411, 18 Pac. Rep. 535.

Washington. If, by rejecting what is false in the description, anything remains to identify the property attempted to be described, the description is sufficient, under the statute. Thus where the description was, "That certain two-story brick building, situated on lots numbered 14, 15, 16, and 17, in block 670, of the Everett Land Company's Addition to the town of Everett, Snohomish County, Washington, which building is known as the Slack Building, and fronts on Hewitt Avenue, in said city, and is about 120 feet front, and extend-

§ 404. **Same. Property identified by name or exclusive character.** Where the property is generally known and designated by a definite name, or is monumental in character, and easily distinguishable from others of like kind, and not to be confounded with others in the same place, in accordance with the rules set forth in the preceding sections, an imperfect description by metes and bounds, or by monuments, is generally upheld by the courts as being sufficient for identification.[171] And upon the theory that the building

ing back from said avenue 80 feet in depth," it is sufficient for the purposes of identification, although not located in such addition to the city, when there is but one such numbered block and but one such named street in Everett, neither of which appear upon the plat of land of the company's addition, and there is but one such building, and that is located in Hewitt Avenue, in block 670 of the original plat of Everett: McHugh v. Slack, 11 Wash. 370, 39 Pac. Rep. 674.

[171] **Mines.** Thus where the description is, "That certain mine commonly called the Red Cloud Mine, situated in Bodie mining district, Bodie township, in Mono County," and it appears from the evidence that the mine was well known and commonly spoken of as the Red Cloud Mine," it is sufficient, the word "mine" meaning the whole claim or body of mining-ground: Tredinnick v. Red Cloud Consol. M. Co., 72 Cal. 78, 81, 13 Pac. Rep. 152. In this case there was a description by courses and distances, which rendered it impossible to trace all the exterior lines of the land; but some monuments were stated which would control the distances; and it was held that the description by name was sufficient for identification. There was no evidence that there was any other mine by that name.

See "Object," §§ 182 et seq., ante.

The same is true where the description is "a quartz-mill, being at or near the town of Scottsville, in Amador County, known as Moore's new quartz-mill," where there is no evidence that there was any other quartz-mill at the place so designated, so as to render it uncertain which was intended: Tibbetts v. Moore, 23 Cal. 208, 213 (Stats. 1856, as amended: decided in 1863). See Montrose v. Conner, 8 Cal. 344, 347 (1855).

Where the claim does not state that the labor was performed "in a mining claim," but on "that certain copper mine," etc., and the charging clause claimed a miner's lien on "said mining claim," it was held sufficient: Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 333, 80 Pac. Rep. 74 (before amendment of 1903), **Kerr's Cyc. Code Civ. Proc.**, § 1183.

Where the land around a mill was described in the claim, "with such convenient space of land around the same as may be required for the convenient use and occupation," it was held sufficient: Tibbetts v. Moore, 23 Cal. 208, 213 (material furnished in 1860; decided in 1863). See Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1079.

Idaho. A claim describing the property as the "Salem Bar Mines," with a description of the location of said mines, consisting of a group of mines, known by said name, and owned by the same person, is sufficient: Phillips v. Salmon R. M. & D. Co., 9 Idaho 149, 72 Pac. Rep. 886.

Montana. Structures: Where the property to be charged with the lien is monumental in character, easily distinguishable, and known

or structure should be primarily described as the "property," a description of which is required by the statute, the courts have held, with a more or less clear statement as to the principle involved, that a sufficient designation of such structure is an adequate compliance with the law.[172]

by a particular name, and no structure of like character existed in the place, a description as "that certain two-story brick building, etc., with the lots on which the same is situated, comprising portions of the following," including a description of certain blocks in the town site, and certain real estate outside of the same, is sufficient, under § 2131 of the Code of Civil Procedure: Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 416.

[172] See Willamette S. M. Co. v. Kremer, 94 Cal. 205, 209, 29 Pac. Rep. 633.

Montana. The property to be identified is the building or improvement on which the lien is given, and hence a particular description of the land is not required: Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413 (under Code Civ. Proc., §§ 2130, 2131).

Oregon. So where the claim misdescribed the block and addition of the town, the plaintiff cannot be permitted to aver or prove the correct description, unless it is manifest that there is a latent ambiguity in the description; and where such notice further stated that claimant furnished the material to B. in erecting a church building for the Methodist Episcopal Church, the evidence showing that there was only one such church in that place built by B., it was held sufficient: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 168, 44 Pac. Rep. 390.

But where no lien is claimed upon any building, and the description, being false, is rejected, the ambiguity is patent, and cannot be corrected: Id.; Hendy M. W. v. Pacific Cable C. Co., 24 Oreg. 152, 33 Pac. Rep. 403.

Washington. It seems that the building must be primarily described, rather than the land: Warren v. Quade, 3 Wash. 750, 29 Pac. Rep. 827. And so where the claim mentions the building or structure upon the lots described, and in the next clause that S. was the owner, and caused the building or structure to be built and erected, it is sufficient: Collins v. Snoke, 9 Wash. 566, 570, 38 Pac. Rep. 161.

In Warren v. Quade, supra, no building was originally mentioned, and the notice referred to the "said building aforesaid," and it nowhere appeared that the buildings referred to were upon the lots described, it was held insufficient, as "a lien cannot be maintained on certain lots, unless the building upon which the work was done is situated on or connected with said lots," said the court. But see Whittier v. Stetson & Post M. Co., 6 Wash. 190, 193, 33 Pac. Rep. 393, 36 Am. St. Rep. 149, in which it was said: "The location at the corner of the streets also helps to identify; and we do not desire to be understood as holding that such a description, without any designation of a lot or block, would not be a sufficient identification, if the quantity of land were also identified, as, for example, if the size of the building on the ground were stated." See also Washington note, ante, this section, and § 405, post. "This court has held that a lien upon a building is ineffectual, unless the land, or some interest therein, be included in it: Kellogg v. Littell & S. Mfg. Co., 1 Wash. 407, 25 Pac. Rep. 461."

In Whittier v. Stetson & P. M. Co., 6 Wash. 190, 194, 33 Pac. Rep. 393, 36 Am. St. Rep. 149, referring to Willamette S. M. Co. v. Kremer,

§ 405. **Same. Description as including too much or too little.**[173] A distinction is thought to exist relative to the effect of a description of the land to be charged with the lien, as including too much or too little.

Too much land. Subject to the rules stated in the preceding sections, a claim of lien is not rendered invalid by a description of the property to be charged with the lien, which includes more land than the law subjects to such lien.[174] Thus where some of the land described is not subject to the lien, as, for instance, where the lien is claimed upon a "mining claim," and part of the land described belongs to a Spanish grant, then not subject to the lien, its inclusion in the claim of lien does not vitiate, if any part of it is a mine.[175]

Too little land. Whether a claim for too little land will vitiate the lien depends upon circumstances,[176] and the safer practice is to file a claim describing the "property" in its entirety, and not necessarily against the "object upon which the labor was performed."[177] The subject is not free from

94 Cal. 205, 209, 29 Pac. Rep. 633, the court say: "The court, upon the theory of liberal construction, and that the owner was not misled, and regarding the statute as authorizing a lien upon the 'property,' which it interpreted to be the house, sustained the lien"; and the case of Tredinnick v. Red Cloud C. M. Co., 72 Cal. 78, 81, 13 Pac. Rep. 152, was explained as follows: "The inception of a mining title is usually by means of a location notice, in which the name is the most prominent feature, and all conveyances follow by the name only. A public record, in that case, identified the property in the first place, but there is no such record of buildings."

[173] See "Territorial Extent of Lien," §§ 438 et seq., post; "Pleading," §§ 710 et seq., post; "Decree," §§ 930 et seq., post.

[174] **Colorado.** A lien will not fail if the claimant described too large a tract, if the land properly subject to it is included therein, especially where no innocent party is misled or injured: Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744 (1889). See Mellor v. Valentine, 3 Colo. 260, 264.

Montana. Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413.

Nevada. A notice of intention to claim a lien may include more property than is subject to the lien: Maynard v. Ivey, 21 Nev. 241, 245, 29 Pac. Rep. 1090.

[175] Bewick v. Muir, 83 Cal. 368, 372, 23 Pac. Rep. 389. But see §§ 182 et seq., ante.

[176] See "Necessity of One or More Claims," § 366, ante; but see especially "Extent of Lien," §§ 438 et seq., post.

[177] **Utah.** The fact that the claim does not cover all the premises upon which the building was erected does not affect the validity of the lien: Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85.

Washington. The land may be described by buildings or structures covering the land, if it is sought to subject the land so covered

difficulty, and in the absence of a more clearly defined statement of the meaning of the word "property," in connection with the description required by the statute, some wavering, if not conflict, in the authorities necessitates a careful scrutiny of the facts of each particular case.

In case of railroad or canal. Generally, where a contractor grades a section of a railroad or canal,[178] the description should be of the entire road or canal, and the claim should not be against the section merely; each case, however, as before stated, depending upon its own peculiar circumstances.[179]

Mines and mining claims. In the case of a mine or mining claim, the description should be of the mine or mining claim,

to the lien, and the buildings are such in character or are so described as to be readily identified: McHugh v. Slack, 11 Wash. 370, 373, 39 Pac. Rep. 674 (under Gen. Stats., § 1667).

But see, under the same statute, Whittier v. Stetson & Post M. Co., 6 Wash. 190, 33 Pac. Rep. 393, 36 Am. St. Rep. 149, in which the description was held insufficient, where the building was designated as "the Brodek and Schlessinger Building," and it covered the "south half of lot 6," which was not included in the description of the land, the building being more or less attached to another building, owned by other parties, constructed at the same time, which rendered the two in the nature of a single structure. See Washington note, § 404, ante.

See also Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. Rep. 458, in which it was held that the description in the claim covering the whole lot was insufficient, where it covered only a part of the lot, other portions of the lot being owned by others, and the description of the part covered by the building not being otherwise sufficiently definite. The principle as laid down in Kellogg v. Littell & Smythe Mfg. Co., 1 Wash. 407, 25 Pac. Rep. 461, seems to be, that although the area of the tract on which the building is situated may be certain and definite, if the location of a smaller piece situated within the tract upon which the building is located is indefinite, the lien cannot be sustained.

[178] South Fork C. Co. v. Gordon, 2 Abb. (U. S.) 479, 22 Fed. Cas. 826, 8 Am. L. Rep. N. S. 279 (Cir. Ct. Cal.); Brooks v. Burlington & S. W. R. Co., 101 U. S. 443, bk. 25 L. ed. 1057; but see South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, bk. 18 L. ed. 894, and dissenting opinion of Justice Field: Pacific R. M. Co. v. Bear V. Irr. Co., 120 Cal. 94, 96, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

And see "Property Viewed as an Entirety," §§ 447 et seq., post.

The claim must, in general, be claimed and enforced against an entire railroad, and not against a particular section thereof: Bringham v. Knox, 127 Cal. 40, 43, 59 Pac. Rep. 198.

[179] Cox v. Western Pac. R. Co., 44 Cal. 18, 28, s. c. 47 Cal. 87, 89. In this case, importance was attached to the fact that the contracts were entire, for the whole work, and plaintiffs did not fully perform, and there was nothing to show an abandonment or interruption of the work. See Pacific R. M. Co. v. Bear V. Irr. Co., 120 Cal. 94, 98, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

and not of the object or structure erected upon it,[180] or upon which the repairs were made.[181]

§ 406. Same. Two or more descriptions.[182] Statutory provision. The California Code of Civil Procedure[183] provides: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens."

§ 407. Same. Application of provision as to demands against separate buildings. The requirement quoted in the last section applies to cases in which one claim is filed against two or more separate and distinct "buildings, mining claims, or other improvements" owned by the same person, and not to the case where all the work was performed on the same property, although upon different portions of it or upon different objects situated thereon.[184] It also applies to the case of one or more buildings erected upon the same lot, though contracted for at different times and under different unfiled contracts between the owner and the same original contractor.[185]

[180] Williams v. Mountaineer G. M. Co., 102 Cal. 134, 142, 37 Pac. Rep. 702, 36 Id. 388, **explained** in Berentz v. Belmont O. M. Co., 148 Cal. 577, 580, 84 Pac. Rep. 47, 113 Am. St. Rep. 308. See Pacific R. M. Co. v. Bear V. Irr. Co., 120 Cal. 94, 96, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

See "Extent of Lien," §§ 438 et seq., post.

[181] Silvester v. Coe Q. M. Co., 80 Cal. 510, 512, 22 Pac. Rep. 217.

[182] See § 366, ante; "Extent of Lien," §§ 438 et seq., post.

[183] **Kerr's Cyc. Code Civ. Proc.,** § 1188.

[184] Dickenson v. Bolyer, 55 Cal. 285, 286. See Williams v. Mountaineer G. M. Co., 102 Cal. 134, 141, 34 Pac. Rep. 702, 36 Id. 388, and Tibbetts v. Moore, 23 Cal. 208, 215. But see Lothian v. Wood, 55 Cal. 159, 163.

As to mechanic's lien in case of separate building, see 2 Am. & Eng. Ann. Cas. 685.

Utah. Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713, 718.

Washington. See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720.

[185] Booth v. Pendola, 88 Cal. 36, 40, 23 Pac. Rep. 200, 25 Id. 1101.

Washington. Separate notices claiming separate liens upon each of three houses situated upon a single lot are not insufficient because they describe each of the houses as being upon the lot, and do not specify any particular portion thereof upon which each house is situated, when no particular portion of the lot has been set apart by

Specific amount due. Such designation is not necessary, unless there is in fact a specific "amount due to him" on each of such improvements, as it may frequently happen that a contractor would construct several buildings under one contract, and there would not be a specific amount due to him on each of such buildings.[186]

Consolidation of mining claims. But where two or more mining locations are consolidated, and thereafter treated and worked as one mining claim, such different locations cease to constitute different claims, and become in law, as they are in fact, only parts of one claim, and this section has no application.[187]

Grading and street-work. And it is thought that the provision has no application to grading and other work, under the Code of Civil Procedure,[188] on property and work mentioned in the specific provision relating thereto, as there is no "improvement," within the meaning of section eleven hundred and eighty-eight [189] of that code.[190]

the owner as necessary to be used in connection with each house. Under Laws 1893, p. 32 (Ballinger's Ann. Codes and Stats., §§ 5900 et seq.), such claims are sufficient, when they indicate an intention to claim a lien upon the entire lot and the buildings thereon situated for all the labor done and materials furnished for all the houses: Sullivan v. Treen, 13 Wash. 261, 43 Pac. Rep. 38. But where the claims attempted to segregate the amounts, but did so indefinitely, the claim was held insufficient: Merchant v. Humeston, 2 Wash. Ter. 433, 7 Pac. Rep. 903.

[186] Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986.

Washington. See Wheeler v. Ralph, 4 Wash. 617, 629, 30 Pac. Rep. 709.

[187] Tredinnick v. Red Cloud C. M. Co., 72 Cal. 78, 84, 13 Pac. Rep. 152; Hamilton v. Delhi M. Co., 118 Cal. 148, 151, 50 Pac. Rep. 378. See Malone v. Big Flat G. M. Co., 76 Cal. 578, 583, 18 Pac. Rep. 772.

Colorado. Such statement not required: Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458 (1883).

Idaho. Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 397, 59 C. C. A. 200.

[188] **Kerr's Cyc. Code Civ. Proc.,** § 1191.

[189] **Kerr's Cyc. Code Civ. Proc.,** § 1188.

[190] Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986. See "Priorities," §§ 486 et seq., post.

As to mechanic's lien for work on streets and sidewalks, see 4 Am. & Eng. Ann. Cas. 1015.

Colorado. Unless a material-man's claim arising from the construction of improvements on a city lot and a portion of an adjoining lot is filed both on the full lot and the portion of a lot, the entire debt may be paid out of the lot which was described in the claim, no other interest having intervened; but in order to assert a claim against both lots, they should have been included in the statement: Perkins v. Boyd (Colo.), 86 Pac. Rep. 1045.

Effect of non-compliance. The only effect of non-compliance is to give precedence to other liens,[191] and it is no concern of the owner of the lot whether the section has been complied with or not.[192]

§ 408. **Claim of charge.** The Code of Civil Procedure [193] provides that the person claiming the benefit of this chapter shall file a " claim " of lien " containing a description of the property to be charged with the lien." [194] No direct statement, in the claim, of the intention to claim a charge upon the property described is necessary, and it is sufficient if such intention appears generally.[195] Thus where the claim avers that the person claimed the benefit of the provisions of chapter two, title four, part three, of the Code of Civil Procedure, it is a sufficient statement that the claimant claimed a lien upon the property described; [196] and it is of little consequence whether the claimant styles the instrument which he files a " claim of lien " or " a claim of benefit under the lien law." [197]

§ 409. **Signature.** There is no express provision in the present statute requiring the claim to be signed, although a

[191] See authorities in note 192, post.

Idaho. Phillips v. Salmon R. M. & D. Co., 9 Idaho 149, 72 Pac. Rep. 886 (under Sess. Laws 1899, p. 148, § 7); Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 397, 59 C. C. A. 200 (under Sess. Laws 1893, p. 51, § 7).

Utah. See Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713; Garner v. Van Patten, 20 Utah 342, 58 Pac. Rep. 684 (Rev. Stats. 1898).

[192] Booth v. Pendola, 88 Cal. 36, 40, 43. See various stages of this decision in 23 Pac. Rep. 200, 24 Id. 714, 25 Id. 1101.

And see "Priorities," §§ 486 et seq., post.

Oregon. See Willamette S. M. L. & M. Co. v. Shea, 24 Oreg. 40, 53, 32 Pac. Rep. 759.

[193] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[194] See "Claim Generally," §§ 361 et seq., ante.

[195] In Gordon v. South Fork C. Co., 1 McAl. C. C. 513, 10 Fed Cas. 817 (reversed in 73 U. S. (6 Wall.) 561, bk. 18 L. ed. 894, on another point), it was held that the fact that the claim of lien did not state that it was intended to hold a lien on the specific work under the acts of 1850 and 1853 did not affect the lien.

Colorado. Claim of charge upon improvements and land, under statutes of 1883, 1889, does not affect decree for sale of improvements only, where there is a prior encumbrance: Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519.

[196] Russ L. Co. v. Garrettson, 87 Cal. 589, 595. 25 Pac. Rep. 747; Bringham v. Knox, 127 Cal. 40, 44. 59 Pac. Rep. 198.

[197] Madary v. Smartt, 1 Cal. App. 498, 500, 82 Pac. Rep. 561.

verification is required;[198] but, under earlier statutes, containing provisions similar to those in the present statute,[199] and not requiring the claim to be signed, it was held that the signing of the verification attached to the claim was sufficient.[200]

§ 410. Verification.[201] The present statute[202] provides that the claimant must file a claim of lien, "which claim must be verified by the oath of himself, or of some other person."[203]

[198] See "Verification," § 410, post.

Washington. Ballinger's Ann. Codes and Stats., § 5904, required the claim to be signed: See Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 317, 39 Pac. Rep. 815.

[199] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[200] Hicks v. Murray, 43 Cal. 515, 522, 523 (under the act of 1868), in which it was said in the dissenting opinion of Crockett, J. (concurring, however, upon this point): "Nor is it necessary that the statement should be signed by the claimant, provided it appears in the body of the statement who the claimant is and by whom the materials were furnished or the labor performed; and provided, also, the statement is verified by the claimant. These would sufficiently identify the claimant and authenticate the statement, without the actual signature of the claimant to the body of the statement. No useful purpose could be subserved by his signature to the body of the statement which he verifies with his oath."

Under the act of 1862, notice to the owner, although not expressly required to be signed by the statute, and though it purported in the body of the notice to come from the claimant, yet where it was not shown to have been in his handwriting, was held invalid: Davis v. Livingston, 29 Cal. 283, 288. The general principle of this decision does not seem to be in accord with the later decisions. See "Notice to Owner," §§ 547 et seq., post.

New Mexico. A claim is not ineffectual by reason of the fact that the claimant uses the initials of his christian name, instead of signing in full. The use of initials only, instead of writing out the christian name of a person, in any legal instrument, is a practice not to be commended: Pearce v. Albright, 76 Pac. Rep. 286.

Utah. Where the claim is subscribed "Duvall and Mills, by Richard Duvall," and was sworn to by Duvall, one of the claimants, and joint contractor, it is sufficient: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1009 (under Laws 1890, ch. xxx, § 10).

Washington. Individual doing business under name of "Western Mill Factory": See Littell v. Saulsberry, 40 Wash. 550, 82 Pac. Rep. 909.

[201] See, generally, § 409, ante.

[202] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[203] See Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195, and the dissenting opinion of Crockett, J., in Hicks v. Murray, 43 Cal. 515, 523 (1868).

Colorado. The statement was required to be verified: Rice v. Carmichael, 4 Colo. App. 84, 87, 34 Pac. Rep. 1010 (1889).

Provision as to verification of pleadings not applicable. Section four hundred and forty-six of the Code of Civil Procedure [204] is applicable solely to pleadings in actions or proceedings, and a claim of lien is not such a pleading, and hence said section is not applicable to such verification, but section eleven hundred and eighty-seven [205] is the proper section to follow. The claim may be verified by any person who is possessed of sufficient knowledge upon the subject; and the particular relation which he bears to the claimant is immaterial.[206]

Form of verification is therefore not required to be in form like that attached to a pleading provided for in section four hundred and forty-six of the Code of Civil Procedure, as

Verification held to contain more than the statute requires: Gutshall v. Kornaley (Colo.), 88 Pac. Rep. 158 (under Sess. Laws 1899, p. 270, c. cxviii, § 8).

Nevada. Held that the county recorder could administer oath and certify to claim: Arrington v. Wittenberg, 12 Nev. 99.

New Mexico. Probate clerk may verify claim: Bucher v. Thompson, 7 N. M. 115, 32 Pac. Rep. 498.

If the claim is not verified, there is no lien, and the verification cannot be amended: Minor v. Marshall, 6 N. M. 194, 198, 27 Pac. Rep. 481; Finane v. Las Vegas H. & I. Co., 3 N. M. 256, 5 Pac. Rep. 725 (signature and seal of office lacking).

New Mexico. Verification before a clerk of a court of record of a sister state, held sufficient: Genest v. Las Vegas M. B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743 (under Comp. Laws 1897, § 2221).

Oregon. Where the verification was not signed, it was held that the statute does not require any particular form of verification, and where the certificate of the notary shows that one of the claimants did verify the claim, it is sufficient: Ainslie v. Kohn, 16 Oreg. 363, 19 Pac. Rep. 97.

Washington. The omission of the notary's seal was held to be a fatal defect, as the notice "was not primarily intended for use in court or in any judicial proceeding, but to obtain and preserve the lien": Gates v. Brown, 1 Wash. 470, 471, 25 Pac. Rep. 914 (under the peculiar language of the statute); Stetson & Post M. Co. v. McDonald, 5 Wash. 496, 32 Pac. Rep. 108 (holding that parol evidence of the fact that the claim had been sworn to was inadmissible, citing the preceding case).

As to omission to add to signature the place of residence of notary, see Sullivan v. Treen, 13 Wash. 261, 43 Pac. Rep. 38.

Verification by attorney for foreign corporation: See Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. Rep. 1073. See also, as to verification, Hopkins v. Jamieson-Dixon M. Co., 11 Wash. 308, 39 Pac. Rep. 815 (Rev. Stats., § 1521).

[204] **Kerr's Cyc. Code Civ. Proc.,** § 446.

[205] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[206] And **Kerr's Cyc. Code Civ. Proc.,** § 446, is applicable solely to pleadings in actions and proceedings, and a claim of lien is not such a pleading: Parke & Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 494, 82 Pac. Rep. 51.

it is not a pleading.[207] Indeed, such form would probably not comply with the requirements of the section; and where the affidavit attached to the claim is that the same is "true," it is sufficient; and the omission of the words, "of his own knowledge," is not a defect;[208] nor is the failure to state that the "claim is true," when it recites "that the facts stated therein are true."[209] And it is not necessary to set out the particulars contained in the body of the claim.[210]

[207] **Kerr's Cyc. Code Civ. Proc.**, § 446, and note.

[208] Arata v. Tellurium G. & S. M. Co., 65 Cal. 340, 344, 4 Pac. Rep. 195; Reed v. Norton, 90 Cal. 590, 602, 26 Pac. Rep. 767, 27 Id. 426.

Montana. A statement of lien on behalf of a corporation, verified by its president on information and belief, was held insufficient, under § 2131 of the Code of Civil Procedure, requiring the claim to be "verified by affidavit," such statement being held to be no affidavit: Western P. Co. v. Fried, 33 Mont. 7, 81 Pac. Rep. 394, 114 Am. St. Rep. 799.

Oregon. "The statute does not prescribe any particular form in which such verification shall be made. No doubt the better practice would be in the form of an affidavit to be annexed to the claim, to the effect that the facts therein stated are true"; and a claim was held sufficient where the month on which the subscription was made was omitted: Kezartee v. Marks, 15 Oreg. 529, 16 Pac. Rep. 407.

Washington. The affidavit must state that the affiant believes the claim to be just (Ballinger's Ann. Codes and Stats., § 904); and a statement "that the claim is just and correct" (Johnston v. Harrington, 5 Wash. 73, 31 Pac. Rep. 316), or an allegation that the affiant believes the same to be true (Sautter v. McDonald, 12 Wash. 27, 40 Pac. Rep. 418), is equivalent.

And see, where the claim stated that a certain amount was due after deducting all just credits and offsets, Fairhaven L. Co. v. Jordan, 5 Wash. 729, 32 Pac. Rep. 729.

[209] Corbett v. Chambers, 109 Cal. 178, 185, 41 Pac. Rep. 873.

Washington. And the employment of the term "lien," instead of "claim of lien," referred to in the verification, does not render it insufficient: Sautter v. McDonald, 12 Wash. 27, 40 Pac. Rep. 418.

[210] Reed v. Norton, 90 Cal. 590, 602, 26 Pac. Rep. 767, 27 Pac. Rep. 426.

New Mexico. The whole claim must be verified, however: Minor v. Marshall, 6 N. M. 194, 199, 27 Pac. Rep. 481; Finane v. Las Vegas H. & I. Co., 3 N. M. 256, 5 Pac. Rep. 725; and the reference of the verification must be to the whole claim, and not to a part of it. And so where the affidavit limits itself by stating "that the abstract of indebtedness mentioned and described in the foregoing notice is true and correct," etc., it is insufficient, the court saying, "It should be remembered that the rule of construction, whether strict or liberal, has reference to the language of the statute, not to that used in compliance with the statute. The question here is, not what construction shall be given to the words 'abstract of indebtedness,' but to the word 'verification,' as used in the statute. We said that the word 'verification,' in the statute, does not require an affidavit; it does not require the signature of the party to the affidavit; it does not require the word 'claim' to be used; but it does require that the officer who certifies to the oath should sign the same, and attach his seal thereto; it does require the use of such plain and unmistakable language that there can be no

Errors and omissions. It was held sufficient where the claim was subscribed by "Williams & Whitmore," and the verification commenced, "——, being duly sworn, deposes and says that he is one of the persons named as Williams & Whitmore in the foregoing claim of lien," etc., and it was signed by A. C. Williams; for, evidently, some one who in the claim of lien was named Williams or Whitmore was sworn, and the signature and certificate of the magistrate fixed the matter beyond question, the blank not being more indefinite than the word "affiant" would have been.[211]

Verification of claim of lien, stating that the person verifying is the agent of the "plaintiff," will be held to manifestly mean that he is the agent of the claimant, as there was then no action, and, technically, no "plaintiff."[212]

By agent or attorney. A verification by an attorney, who states that, "as such attorney, he has knowledge of the facts," and makes affidavit for the claimant, on account of his absence from the state, is sufficient.[213]

Time of verification. The fact that a verification was made several months prior to the completion of the building and to the filing of the claim does not render the verification premature or insufficient.[214]

§ 411. **Uncertainty in claim.**[215] It is thought that where the claim of lien is uncertain it will be construed against the

reasonable doubt but that he is swearing to the whole claim": Minor v. Marshall, 6 N. M. 194, 199, 27 Pac. Rep. 481.

Oklahoma. See El Reno E. L. & T. Co. v. Jennison, 5 Okl. 759, 50 Pac. Rep. 144.

[211] San Diego L. Co. v. Wooldredge, 90 Cal. 574, 580, 27 Pac. Rep. 431.

[212] Parke & Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 494, 82 Pac. Rep. 51.

[213] Jones v. Kruse, 138 Cal. 613, 617, 72 Pac. Rep. 146.

Montana. So where the affidavit recited that M., the assistant manager of the corporation claimant, was duly sworn, and was subscribed with the name of the corporation by M., assistant manager, it was held sufficient: Montana L. & M. Co. v. Obelisk M. & C. Co., 15 Mont. 20, 37 Pac. Rep. 897.

Oregon. Verification by the secretary of corporation, held sufficient: Cooper M. Co. v. Delahunt, 36 Oreg. 402, 60 Pac. Rep. 1, 51 Id. 649 (under Hill's Ann. Laws, § 3673).

Utah. Verification by attorney: Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85.

[214] Coss v. MacDonough, 111 Cal. 662, 668, 44 Pac. Rep. 325.

[215] See, generally, "Amendment," § 415, post; "Variances," §§ 835 et seq., post.

claimant. Thus where the claim stated that the contract was entered into "on or about July 1st," to furnish certain materials for the building, the claimant was not permitted to recover for any materials furnished before that date, although under a contract entered into before that date.[216]

§ 412. Mistake and error in claim.[217] A new section[218] added to the California Code of Civil Procedure provides as follows: "No mistakes or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such

[216] Goss v. Strelitz, 54 Cal. 640, 643. See Santa Monica L. & M. Co. v. Hege, 48 Pac. Rep. 69; and see opinion on rehearing, 119 Cal. 376, 51 Pac. Rep. 555.

See "Complaint," § 670, post.

Date of contract need not be inserted. There is nothing in the statute expressly requiring the date of the contract to be inserted in the claim. See "Unnecessary Statements," §§ 374 et seq., ante.

Uncertainty as to whether one or two buildings: See Eaton v. Malatesta, 92 Cal. 75, 76, 28 Pac. Rep. 54.

Uncertainty in description: See §§ 399 et seq., ante.

See §§ 371 et seq., ante, and §§ 387 et seq., ante.

[217] See, generally, "Amendment," § 415, post; "Variances," §§ 835 et seq., post; "Construction," § 317, ante; "Contract," §§ 387 et seq., ante.

Error as to time of last payment: See Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

As to truthfulness of statement in regard to terms of contract, see McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622.

See also § 389, ante.

Nevada. Claiming more than is due, by mistake, and without fraud or wrongful intent, does not invalidate claim of lien: Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632, 638 (Cir. Ct. Nev.).

Oregon. Mistake made in an honest belief as to its correctness will not avoid the claim, but otherwise if claimant knows the statement to be untrue, or could have known by the exercise of reasonable diligence: Cooper M. Co. v. Delahunt, 36 Oreg. 402, 60 Pac. Rep. 1, 51 Id. 649 (the lien claimed showed a credit of three hundred dollars, while the court found a four-hundred-dollar credit, and there was a difference of opinion between the parties as to the fifty-dollar difference).

Utah. Claimant is not entitled to recover more than the amount set up in his claim of lien: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1011.

Washington. Interest should not be allowed, when not claimed in the claim of lien, especially where the complaint does not pray for such interest: Huetter v. Redhead, 31 Wash. 320, 71 Pac. Rep. 1016.

[218] **Kerr's Cyc. Code Civ. Proc.,** § 1203a (in effect sixty days from and after March 22, 1907).

mistake or error in the statement of the demand, credits and offsets, or of the balance due, was made with the intent to defraud, or the court shall find that the innocent third party, without notice, direct or constructive, has since the claim was filed, become the bona fide owner of the property liened upon, and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner."

Analysis of provision. It will be noted that this section makes reference only to mistakes or errors in the statement of —

1. The demand;
2. The amount of credits and offsets;
3. The balance asserted to be due to claimant; and
4. The description of the property.

The several requirements as to the claim of lien are not all here enumerated. The evident intent was to make a statutory enunciation of a general rule, and probably there is no intendment that a stricter rule shall be applied in regard to the requirements not so enumerated; i. e., the names of the owner, employer, and purchaser, and the terms, time given, and conditions of the contract. This subject has been considered in some detail under various subheads in the preceding part of this work.[219]

§ 413. **Same. Unnecessary statements.** It has already been shown that a misstatement of a fact not required by the statute to be stated will not invalidate the claim.[220] Thus where there is a mistaken statement as to the date of the completion of the work, or as to the date of the contract,[221] which are not required by the statute;[222] or where there is a misstatement of a fact not material in the claim of lien,

[219] See §§ 375 et seq., and §§ 399 et seq., ante.

[220] "Unnecessary Statements," §§ 374 et seq., ante.

Oregon. Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437.

[221] Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 568, 42 Pac. Rep. 154.

[222] Slight v. Patton, 96 Cal. 384, 386, 31 Pac. Rep. 248.

Colorado. A recital in a claim of the date of completion of a building is not conclusive on the claimant, since the law does not require the date to be inserted therein; although it may be of some value as against his declarations, yet it is not, in a legal sense, so far conclusive that he may not prove the actual time: Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83, 86 (under act of 1893).

as of a sum due for a certain reason, which is wrong, when the sum is actually due.[223]

§ 414. **Same. Other illustrations.** Subject to the general rule as to good faith and intervening rights of bona fide dealers with the property, the following illustrations are given.

Contract. Where the contract as to one item was improperly set forth in the claim of lien, the lien is not void as to the other items concerning which the contract was correctly stated; otherwise the purpose and objects of the lien law would be defeated.[224]

Names. Where the statute required the claimant to state from whom the debt was due, it was held that a mistake in the name of the contractor would not vitiate the lien, if it appeared that the owner was not harmed by the error.[225] An honest mistake as to ownership, where the claimant was justified in assuming, for instance, that the husband was the reputed owner, will not, alone, vitiate the lien.[226]

Amount due. A claim good in other respects will not be rejected, merely because the amount claimed is somewhat larger than can be sustained by the proofs, unless it be so wilfully false as to amount to a fraud;[227] and, of course, where an overstatement of the amount due on a claim of lien is upon its face a mere clerical error, it will not invalidate the lien.[228]

[223] Harmon v. Ashmead, 68 Cal. 321, 323, 9 Pac. Rep. 183.

[224] Linck v. Johnson, 134 Cal. xix, 66 Pac. Rep. 674.

[225] Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 619, 25 Pac. Rep. 124 (dictum); but citing Putnam v. Ross, 46 Mo. 337.

See Jewell v. McKay, 82 Cal. 144, 145, 23 Pac. Rep. 139 (the name of the purchaser or employer must be given).

See "Names," §§ 379 et seq., ante.

Colorado. Mistake not tending to deceive persons interested does not vitiate: Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456 (1883); Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519 (1883).

[226] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 119, 65 Pac. Rep. 329.

[227] Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 78 Pac. Rep. 21; Snell v. Payne, 115 Cal. 218, 222, 46 Pac. Rep. 1069.

See "Demand," §§ 375 et seq., ante.

[228] Snell v. Payne, 115 Cal. 218, 46 Pac. Rep. 1069, the court further saying, "At most, it can only postpone it to the other liens" (dictum); but no authority which supports the proposition is given.

See "Priorities," § 786, post; "Amendment," § 415, post; "Forfeiture," §§ 632, 633, post.

Oregon. See Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 170, 44 Pac. Rep. 390.

Non-lienable items. Where the claim contains non-lienable items that cannot be segregated from the general aggregate, the claim cannot be sustained;[229] but, as already pointed out,[230] when such items can be separated, and the claimant has acted in good faith, the lien will be upheld, even without the aid of such a provision as section twelve hundred and three a of the Code of Civil Procedure.[231]

§ 415. Amendment of claim. Without statutory permission, a claim of lien is not an instrument generally susceptible of reformation,[232] or of amendment after filing.[233]

[229] McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622.

As to effect on right to lien of non-lienable items, see 4 Am. & Eng. Ann. Cas. 836.

Arizona. Where it appears that some of the articles were not furnished within the statutory time before the filing of the claim, the lien will be sustained as to the items within the statutory time, in the absence of fraud or bad faith, and when the claimant believed himself to be entitled to a lien for all of the items: Wolfley v. Hughes (Ariz.), 71 Pac. Rep. 951.

When it is impossible from complaint and account to determine what part of the account charged is secured by a lien, and what part is non-lienable or unsecured, the court will not permit parol evidence to be introduced to cure the defect, and therefore the entire lien is lost: Wolfley v. Hughes (Ariz.), 71 Pac. Rep. 951.

Nevada. Claiming more than actually due, by mistake, without fraud or wrongful intent, does not vitiate claim: Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632, 638.

Oregon. Honest mistake as to amount: See Cooper M. Co. v. Delahunt, 36 Oreg. 402, 60 Pac. Rep. 1, 51 Id. 649. If he knows the statement is untrue, or could have so known by the exercise of reasonable diligence, the lien fails: Id. See Barton v. Rose (Oreg.), 85 Pac. Rep. 1009.

Utah. Honest mistake in statement of amount due will not vitiate claim: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1010.

Washington. Non-lienable items that can be segregated when included in the claim do not establish fraud nor destroy lien, as they may have been included by mistake and under the honest belief that they were lienable; and, under a joint lien, are to be deducted pro rata from liens on several houses, as segregated: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720. See Dexter v. Olsen, 40 Wash. 199, 82 Pac. Rep. 286; Robinson v. Brooks, 31 Wash. 60, 71 Pac. Rep. 721.

[230] See § 377, ante.

[231] **Kerr's Cyc. Code Civ. Proc.,** § 1203a.

[232] Fernandez v. Burleson, 110 Cal. 164, 167, 42 Pac. Rep. 566, 52 Am. St. Rep. 75; Goss v. Strelitz, 54 Cal. 640, 644.

See § 406, ante.

[233] Madera F. & T. Co. v. Kendall, 120 Cal. 182, 183, 52 Pac. Rep. 304, 65 Am. St. Rep. 117.

Colorado. Ineffectual amendment of claim: See Perkins v. Boyd (Colo.), 86 Pac. Rep. 1045.

Certain clerical errors, however, may be regarded as corrected, when they are apparent upon the face of the claim. Thus where it appears by the complaint that, in his claim as filed, the claimant stated the name of the person by whom he was "occupied," the court construed the term to mean "employed."[234] Likewise a statement in the verification, that the affiant was the agent of "plaintiff," was construed to mean the agent of "claimant."[235]

No aider by averment in complaint. A failure to state an essential fact in the claim, such as the name of the person to whom the materials were furnished, is not aided by the averment of the fact in the complaint, as the claim which is filed for record must be complete in itself at that time, in order to authorize its enforcement.[236]

Nevada. Where the notice filed contained an otherwise sufficient description, a change in the number of the lot, made on the statement in the recorder's office before the expiration of the time within which to file the same, made without fraud, does not vitiate it: Hunter v. Truckee Lodge, 14 Nev. 24, 30.

New Mexico. Verification cannot be amended: Minor v. Marshall, 6 N. M. 194, 198, 27 Pac. Rep. 481.

Oklahoma. Under a statute (Stats. 1893, § 4531) allowing amendments, an amendment to the verification was permitted: El Reno E. L. & T. Co. v. Jennison, 5 Okl. 759, 763, 50 Pac. Rep. 144; the court saying, "We hold the proper construction of this act to be that the mechanic's lien may be amended in any matter where, for similar reasons, a pleading could be amended": Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303, 306.

Oregon. The court cannot change the language used in the claim, by eliminating or substituting words, or by supplying omissions therefrom: Barton v. Rose (Oreg.), 85 Pac. Rep. 1009.

Washington. Amendment allowed as in the case of pleadings, so long as interests of third parties may not be affected (under Ballinger's Ann. Codes and Stats., § 5904): Olson v. Snake R. V. R. Co., 22 Wash. 139, 60 Pac. Rep. 156; Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144; Dexter v. Olsen, 40 Wash. 199, 82 Pac. Rep. 286, 287.

Under this provision an amendment was allowed by adding the place of residence of the notary to the verification, and the third parties whose interests are not to be affected are only those who have acquired some interest subsequent to the filing of the lien notice, and the clause has no reference to those whose relation to the property had not been changed since such filing: Sullivan v. Treen, 13 Wash. 261, 43 Pac. Rep. 38.

Under a previous statute the affidavit could not be amended by affixing the seal of the notary thereto: Stetson & Post M. Co. v. McDonald, 5 Wash. 496, 32 Pac. Rep. 108.

[234] McDonald v. Backus, 45 Cal. 262, 264. See "Construction," § 371, ante; "Notice," §§ 568 et seq., post.

[235] Parke & Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 494, 82 Pac. Rep. 51.

[236] Madera F. & T. Co. v. Kendall, 120 Cal. 182, 183, 52 Pac. Rep. 304, 65 Am. St. Rep. 117.

CHAPTER XXI.

CLAIM OF LIEN (CONTINUED). FILING CLAIM.

§ 416. Filing claim. In general.
§ 417. Statutory provisions.
§ 418. Purpose of provision requiring claims to be filed within a certain time.
§ 419. Same. In case of void contract.
§ 420. Place of filing claim for record.
§ 421. Original contract void. Necessity of filing claim.
§ 422. Time of filing claim. In general.
§ 423. Same. Computation of time.
§ 424. Time of filing, when not fixed by statute.
§ 425. Notice of completion or cessation of work. Statutory provision.
§ 426. Same. Purpose and scope of provision.
§ 427. Same. Failure of owner to file notice.
§ 428. Same. In case of structures.
§ 429. Same. General rule.
§ 430. Time of filing claim. Certificate of architect.
§ 431. Same. Substantial or actual completion.
§ 432. Same. Abandonment of the work.
§ 433. Same. Thirty days' cessation from labor.
§ 434. Same. Agreements affecting time of filing claims. Giving credit.
§ 435. Same. Void contract.
§ 436. Same. Mines and mining claims.
§ 437. Same. Grading, etc.

§ 416. Filing claim. In general.[1] In several jurisdictions the statute requires that a notice of intention to file a claim of lien shall be filed, or a notice that such a claim has been

[1] **As to time when statute of limitations begins to run against mechanic's lien,** see note 7 Am. & Eng. Ann. Cas. 947.

Time for filing claims, under act of March 27, 1897, for work on public structures: See French v. Powell, 135 Cal. 636, 639, 68 Pac. Rep. 92.

Washington. See, generally, Lee v. Kimball (Wash.), 88 Pac. Rep. 1121.

Material-man failing to file notice with school board: See Crane Co. v. Ætna I. Co. (Wash.), 86 Pac. Rep. 849.

Claim must be filed under act of 1893, ch. xxiv, p. 32, § 1, even though the railroad company has filed no bond; and no recovery can be had on such bond after the filing of such claim: Laidlaw v. Portland V. & Y. R. Co., 42 Wash. 292, 84 Pac. Rep. 855.

filed shall be served on the owner;[2] but the statutes generally do not require such notice. This chapter treats particularly of the filing of the claim of lien; the subject of service of notice on the owner to intercept payments in the nature of a garnishment being left for later consideration.[3]

It has already been shown that the statutory provision as to filing the claim of lien must be complied with,[4] and in what cases such claim is required to be filed. It has also been shown that the object of filing the claim is: 1. To perfect the lien; and 2. To give notice by public record, for the protection of those who may deal (a) with the owner of the property, or (b) with the land itself; and further, 3. To inform the owner of claims of lien-holders.[5]

The inchoate right to a lien ceases to exist after the statutory period for filing the claim of lien has passed.[6]

[2] **Colorado.** Notice of intention to file claim must be given, the statute specifying no particular form, and an error in the address is immaterial: Colorado I. W. v. Taylor, 12 Colo. App. 451, 55 Pac. Rep. 942, 945.

Oklahoma. The notice of filing a mechanic's lien is not required to be served by an officer or any special individual, and the rules with reference to the return of an officer to a writ, or the service, do not apply: Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170 (under Code Civ. Proc., § 1963).

The principal contractor is not required to serve notice of the filing of his lien, under § 621 of the Code of Civil Procedure, relating to liens of subcontractors: Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

Utah. The subcontractor has forty days from the time of furnishing the last materials in which to file a notice of intention to claim a lien, and the original contractor has sixty days from the time of the completion of his contract: Cahoon v. Fortune M. & M. Co., 26 Utah 86, 72 Pac. Rep. 437 (under Rev. Stats., § 1386); Sanford v. Kunkel, 30 Utah 379, 85 Pac. Rep. 363, 365, 1012 (under Rev. Stats. 1898, § 1386); Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1010 (under Sess. Laws 1890).

[3] See "Notice to Owner," §§ 547 et seq., post.

[4] See §§ 354 et seq., ante; and see Meyer v. Quiggle, 140 Cal. 495, 497, 74 Pac. Rep. 40.

[5] See §§ 365, 376, 388, 401, ante, and § 418, post.

In Mars v. McKay, 14 Cal. 127, 128 (1856), decided under a statute which required the filing of an "account," with a description of the property, etc., the court seems to allude to the "account" as being filed for the purpose only of giving notice.

Washington. Johnston v. Harrington, 5 Wash. 73, 79, 31 Pac. Rep. 316; Gates v. Brown, 1 Wash. 470, 474, 25 Pac. Rep. 914; Cowie v. Ahrenstedt, 1 Wash. 416, 418, 25 Pac. Rep. 458.

[6] Provident M. B. L. Assoc. v. Shaffer, 2 Cal. App. 216, 83 Pac. Rep. 274; but see Hughes v. Hoover (Cal., Feb. 23, 1906), 84 Pac.. Rep. 681.

Utah. The lien is not created until the claim is filed, and until then it is inchoate, but relates to the time of commencing the work: Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605 (under Rev. Stats. 1898, § 1386).

§ 417. **Statutory provisions.** The California statute [7] provides: "[A] Every original contractor, [1] at any time after the completion of his contract, and [2] until the expiration of sixty days after the filing of said notice of completion or notice of cessation of labor by the owner,[8] and [B] every person, save the original contractor, claiming the benefit of this chapter, [1] at any time after the completion of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, and [2] until the expiration of thirty days after the filing of said notice of completion or cessation, by said owner, or [3] within thirty days after the performance of any labor in a mining claim, must file for record with the county recorder of the county, or city and county, in which such property or some part thereof is situated, a claim; . . . provided, however, [C] that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to, or repair thereof. Any trivial imperfection in the said work, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in all cases the occupation or use of a building, improvement, or structure, by the owner, or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, and cessation from labor for thirty days upon any contract or upon any building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter."

§ 418. **Purpose of provision requiring claims to be filed within a certain time.** Under the contract between the owner and the contractor, the owner agrees to pay the

[7] **Kerr's Cyc. Code Civ. Proc.,** § 1187; in effect sixty days from March 27, 1897.

As to what constitutes completion, see, generally, §§ 334 et seq., ante; "Notice of Completion," §§ 425 et seq., post.

[8] **As to provision relating to filing of notice of completion or cessation of labor,** see §§ 425 et seq., post.

contractor a certain sum for constructing the building, and this sum is a fund which may be held, under the statute, for the payment, so far as it will go, of all the claims of all the various subcontractors, for work and materials furnished by them to the contractor, who is the principal and head of all; and all the parties entitled to payment or contribution out of this fund should be able to reach the fund and get their proportionate shares thereof at the same time or within the same period of time. Besides, one subcontractor ought not to be able to reach this fund and appropriate it to the extent of his claim before another subcontractor could reach it; for if the fund should not be sufficient to pay the claims of all the subcontractors, then each subcontractor should be paid only a proportionate share thereof. Now, the amount of all the claims of all the subcontractors can be ascertained only after all the work and materials have been furnished and after the building has been completed, so far as the contractor is required to complete the same; for the whole of the work may in fact be done by subcontractors only, or the last item of work performed or materials furnished may be performed or furnished by a subcontractor. The building, in such a case, would be completed by a subcontractor; and the subcontractor completing the building, or furnishing the last item of work or material therefor, is entitled to his proportionate share of the general fund equally with the subcontractor who furnished the first item of work or material, or any intermediate portion thereof. Of course, when the contractor has furnished, through himself or his subcontractors, all the work and material which he has agreed to furnish, then the building is completed, so far as he is concerned, and is also completed so far as all the subcontractors under him are concerned; and the contractor and each of the subcontractors may then file their respective claims of liens, and each will then become entitled to his proportionate share of the fund.

It is obvious that if a subcontractor may file his claim before the completion of the building at all, it may very well happen that the building may not be completed until more than ninety days after the claim is filed, and since the

statute [9] provides that no lien shall be binding for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same, it follows that, under a different construction of section eleven hundred and eighty-seven, a suit might be maintained to enforce the lien of a subcontractor before the completion of the original contract, when valid. This would not only be to give one subcontractor a preference over another, not allowed by the statute, but might subject the owner to suit, and possibly his property to sale, although strictly conforming to his contract. In further harmony with the conclusion that section eleven hundred and eighty-seven [10] fixes a common starting-point for all subcontractors under the same original contractor, is section eleven hundred and ninety-five,[11] which provides that " any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them." [12]

§ 419. **Same. In case of void contract.** As the owner is liable for the value of all the labor done and materials furnished in the construction of a building, and as suits to enforce liens therefor must be commenced within ninety days after the filing of the claim of lien, there is a manifest propriety, where there is no valid contract for any of the work, in requiring that the building shall be completed before any claims of lien are filed, in order that they may all be adjusted in a single action. If claims could be filed prior to the completion of the building, it may happen that it would be necessary to institute actions for their foreclosure before the building was completed, and while other laborers who would be entitled to have a lien thereon would be precluded not only from filing their claim of lien, but from seeking its enforcement.[13]

[9] **Kerr's Cyc. Code Civ. Proc., § 1190.**

[10] **Kerr's Cyc. Code Civ. Proc., § 1187.**

[11] **Kerr's Cyc. Code Civ. Proc., § 1195.**

[12] Roylance v. San Luis Hotel Co., 74 Cal. 273, 277, 20 Pac. Rep. 573, **quoting and approving** Perry v. Brainard (Cal., Dec. 19, 1885), 8 Pac. Rep. 882.

[13] Davis v. MacDonough, 109 Cal. 547, 550, 42 Pac. Rep. 450.

Nevada. See, however, Hunter v. Truckee Lodge, 14 Nev. 24, 28 (1875).

§ 420. Place of filing claim for record.[14] The claim must be filed "for record with the county recorder of the county, or city and county, in which such property or some part thereof is situated."[15]

In case of railroad. The statute[16] does not require the claim of lien to be filed for record in each county in which a railroad is situated; and where it lies in two counties, the claim may be filed in either county, as the courts have no power to amend the statute by requiring the filing of a claim in every county where any part of the property may be situated.[17]

Removal of claim of lien from recorder's office. As the claim is made a matter of record, and the removal of the claim from the recorder's office does not defeat any object for which the claim is required to be filed, such removal does not affect the lien.[18]

§ 421. Original contract void. Necessity of filing claim. If the statutory original contract is void, in order that a

[14] **Kerr's Cyc. Code Civ. Proc., § 1189,** which provides: "The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments."

Kerr's Cyc. Pol. Code, § 4236, subd. 16. By this subdivision the county recorder is required to keep "an index of notices of mechanics' liens, labeled 'Mechanics' liens,' each page divided into three columns, headed respectively, 'Parties claiming liens,' 'Against whom claimed,' 'Notices when and where recorded.'" The same provision is found in § 121 of the County Government Act (Stats. and Amdts., p. 402, **Henning's General Laws,** p. 221).

It is by this index that a subsequent dealer with the property is to be guided in ascertaining whether there are any encumbrances upon the owner's title: Corbett v. Chambers, 109 Cal. 178, 182, 41 Pac. Rep. 873.

Washington. See Garneau v. Port Blakeley M. Co., 8 Wash. 467, 36 Pac. Rep. 463.

[15] **Kerr's Cyc. Code Civ. Proc., § 1187.**

[16] **Kerr's Cyc. Code Civ. Proc., § 1187.**

[17] Bringham v. Knox, 127 Cal. 40, 44, 59 Pac. Rep. 198.

Compare: "Filing Contract," §§ 294 et seq., ante.

As to mechanics' liens on railroads, see note 7 Am. & Eng. Ann. Cas. 629-672.

Colorado. But where the statute required the notice to be filed in the county where the property is situate, the notice must be filed in every county wherein the property is situate: Arkansas River L. R. & C. Co. v. Flinn, 3 Colo. App. 381, 383 (canal-railroad), (1889).

[18] Mars v. McKay, 14 Cal. 127, 128 (1856).

Wyoming. But see Fein v. Davis, 2 Wyo. 118 (1871).

laborer or material-man may preserve and enforce the lien provided for him by the statute, his claim therefor must be filed in the recorder's office with as much specification, and within the same time, as if he had himself made a contract for his labor or material directly with the owner.[19]

§ 422. Time of filing claim. In general. Unless the claimant file his claim within the time allowed by the statute, his lien is lost;[20] and, on the other hand, the filing of

[19] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629.

[20] Walker v. Hauss-Hijo, 1 Cal. 184, 186; Weithoff v. Murray, 76 Cal. 508, 510, 18 Pac. Rep. 435; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 232, 39 Pac. Rep. 758; Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 626, 16 Pac. Rep. 516; Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896; Santa Clara Valley M. & L. Co. v. Williams (Cal., Dec. 8, 1892), 31 Pac. Rep. 1128; Harmon v. San Francisco & S. R. R. Co., 105 Cal. 184, 188, 38 Pac. Rep. 632.

Colorado. Changes insisted upon by the owner to correct work asserted not to have been done in accordance with the contract are not to be regarded as immaterial, but as necessary parts of the contract, and the claim may be filed within the statutory period after such changes are made: Stidger v. McPhee, 15 Colo. App. 252, 62 Pac. Rep. 332.

Montana. Alesina v. Stock, 8 Mont. 416, 20 Pac. Rep. 642; Alvord v. Hendrie, 2 Mont. 115; Davis v. Alvord, 94 U. S. 545, bk. 24 L. ed. 283.

Furnishing of a small last item as a subterfuge for filing a claim, when the time had really expired, does not bring the claim within the statutory time: See Aldritt v. Panton, 17 Mont. 187, 42 Pac. Rep. 767.

Oregon. Forest Grove D. & L. Co. v. McPherson, 31 Oreg. 586, 46 Pac. Rep. 884.

Furnishing of additional articles by agreement with the owner, after the expiration of the time limited for filing the lien, for the purpose of reviving the right, will not have that effect as against a mortgagee who is not a party to the transaction, even if such agreement is valid between the claimant and the owner: Inman v. Henderson, 29 Oreg. 116, 45 Pac. Rep. 300. See Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67.

Where extra work is done or materials furnished by the contractor, during the performance of his agreement, as a part of or in furtherance of the same general object, it will be deemed, for the purpose of mechanics' liens, a part of the original contract, and the time within which to file a claim for the amount due on the contract and the extra work will commence to run from the date of the completion of the work as a whole: Hobkirk v. Portland B. Club, 44 Oreg. 605, 76 Pac. Rep. 776.

As to running account, and when mechanic's lien must be filed on, see 2 Am. & Eng. Ann. Cas. 685; 7 Am. & Eng. Ann. Cas. 947.

Utah. See Salt Lake L. Co. v. Ibex M. & S. Co., 15 Utah 440, 49 Pac. Rep. 832; Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85; Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238; Carey-Lombard Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572; Eclipse S. M. Co. v. Nichols, 1 Utah 252 (1869).

the claim of lien before the time authorized by statute is premature, and no right to enforce a lien will be thereby acquired.[21]

Delivery of additional materials. Effect on right. When the time for filing a claim for materials has expired, a delivery of additional materials, not contemplated in the original order, and not needed nor used, cannot give nor revive a right to file a claim for a balance due on all the materials, including those furnished under the first order, and thus defeat a lien already foreclosed: Cahoon v. Fortune M. & M. Co., 26 Utah 86, 72 Pac. Rep. 437 (on mine, under Rev. Stats. 1898, § 1386).

Contractor cannot keep alive or revive his right to file a lien by tacking on or adding to his account by additional orders for labor or materials long after the time for filing his claim has expired: Cahoon v. Fortune M. & M. Co., 26 Utah 86, 72 Pac. Rep. 437 (in mine).

Washington. Seattle & W. W. R. Co. v. Ah Kow, 2 Wash. Ter. 36, 3 Pac. Rep. 188.

Time of filing lien. Effect of superintendent's certificate of completion. Within ninety days from cessation of performance or furnishing, under Ballinger's Ann. Codes, § 5904, notwithstanding previous certificate of superintendent that the structure is finished: Washington B. Co. v. Land & R. Imp. Co., 12 Wash. 272, 40 Pac. Rep. 982.

Same. Subsequent contract for material. And, notwithstanding a subsequent contract for the furnishing of the rest of the materials, where the first contract has been broken off, the claim for the material under the first contract was required to be filed within ninety days after ceasing to furnish materials thereunder: Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. Rep. 273.

In Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099, it was said: "As to the time of the record of the lien, that is a matter over which the respondent has no control; he has done what the law requires of him when he files the lien for record."

[21] Davis v. MacDonough, 109 Cal. 547, 550, 42 Pac. Rep. 450; Santa Monica L. & M. Co. v. Hege, 48 Pac. Rep. 69, s. c. on rehearing 119 Cal. 376, 378, 51 Pac. Rep. 555; Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep. 840; Schwartz v. Knight, 74 Cal. 432, 434, 16 Pac. Rep. 235; Roylance v. San Luis Hotel Co., 74 Cal. 273, 277, 20 Pac. Rep. 573; Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Perry v. Brainard, 8 Pac. Rep. 882, 8 West Coast Rep. 429; Schallert-Ganahl L. Co. v. Sheldon (Cal., Feb. 9, 1893), 32 Pac. Rep. 235; Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 83, 24 Pac. Rep. 648. See Reed v. Norton, 90 Cal. 590, 600, 26 Pac. Rep. 767, 27 Id. 426; French v. Powell, 135 Cal. 636, 640, 68 Pac. Rep. 92.

Prematurely filed claim of mechanic's lien cannot be enforced: Baker v. Lake L. C. & Irr. Co. (Cal. App., March 26, 1908), 94 Pac. Rep. 773.

Colorado. Subcontractors' claims filed before thirty days "after completion" of the building are premature, and of no effect: Tabor-Pierce L. Co. v. International T. Co., 19 Colo. App. 108, 75 Pac. Rep. 150 (under Laws 1893, ch. cxvii, p. 318).

Compare: Hart v. Mullen, 4 Colo. 512.

Nevada. Contra: Hunter v. Truckee Lodge, 14 Nev. 24, 28.

Oklahoma. "So long as a party's time for filing a mechanic's lien has not expired, he could file as many statements in his efforts to make a good lien as he chose": El Reno E. L. & T. Co. v. Jennison, 5 Okl. 759, 764, 50 Pac. Rep. 144.

§ 423. **Same. Computation of time.** The ordinary rules for the computation of time within which acts must be done apply generally in the case of the filing of claims of lien.[22]

The word "within," as used in the statute,[23] and in similar provisions of law, has been held to mean "not beyond," and any act is "within" a time named that does not extend beyond it.[24]

§ 424. **Time of filing, when not fixed by statute.** Independently of the question of estoppel raised by the amendment of 1897 to section eleven hundred and eighty-seven,[25]

Washington. Where the claim is prematurely filed, for the reason that the last portion of the materials furnished had not arrived, although on the way, the claimant has a right to file a second notice after the delivery of the materials: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. Rep. 1073.

[22] **Kerr's Cyc. Civ. Code,** § 10; **Kerr's Cyc. Code Civ. Proc.,** § 12, and notes.

[23] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[24] French v. Powell, 135 Cal. 636, 639, 68 Pac. Rep. 92, construing act of March 27, 1897, relating to filing claims for labor or material for public work.

Montana. Where there are separate contracts not constituting a running account for materials, and where there is no reasonably, if not perfectly, definite amount to be furnished from time to time under one entire contract, the claim must be filed within ninety days from the time when payment was due under each contract: A. M. Holter H. Co. v. Ontario M. Co., 24 Mont. 184, 61 Pac. Rep. 3, 7, 8 (under Code Civ. Proc., § 2131).

New Mexico. From time of last item: See Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284, 285.

Oregon. A claim for labor in a mine was required to be filed within sixty days after cessation from labor thereon, and the time is reckoned by excluding the first day, or day from or after which an act is done, or last day of service, and including the last of the period prescribed: Horn v. United States M. Co., 47 Oreg. 124, 81 Pac. Rep. 1009.

First and last day for computing time: See note 49 L. R. A. 236.

Washington. The claim of a material-man filed August 4th, the furnishing of materials beginning on March 19th and ceasing on May 6th, is within ninety days, all of the last day being given to file the claim: Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001.

Claim is not filed in time when the work was completed and accepted during the first days in October and the claim was filed April 3d: Ellsworth v. Layton, 37 Wash. 340, 79 Pac. Rep. 947.

Wyoming. An indebtedness becomes complete by performing the labor or furnishing the materials, and is considered complete, or to have "accrued," when the last item originally included in the account is furnished or done, and not when the last item remaining unpaid is so furnished or done: and the claim must be filed within ninety days after such accrual: Big Horn L. Co. v. Davis, 14 Wyo. 455, 84 Pac. Rep. 900, 85 Id. 1048 (under Rev. Stats. 1899, § 2893).

[25] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

where the statute requires the filing of the claim in order to perfect the lien, and does not provide any particular time within which the same shall be done, it must be filed within a reasonable time.[26] It has been shown that contractors, subcontractors, and laborers may have a lien for the labor performed upon a building, improvement, or structure, whether the work was for the "construction, alteration, addition to, or repair," or not.[27]

Filing after completion. The statute[28] provides for the filing of claims "after the completion of any building, improvement, or structure, or of the alteration, addition to, or repair thereof," and does not provide for the filing of a claim after the completion of work on objects other than those specified. The expression, "every person, save the original contractor, claiming the benefit of this chapter," must file his claim after such completion, would not seem necessarily to indicate that the claim must be filed after the completion of all kinds of labor; if there should be such case, the general principle laid down in the case above cited would be applicable;[29] namely, that the claim must be filed within a reasonable time. The fact that the expression, "every person, save the original contractor, claiming the benefit of this chapter," must file a claim after the completion of such work, is followed by the clause, "or within thirty days after the performance of any labor in a mining claim," a claim must be filed, shows that the clause containing the expression "every person" does not pro-

[26] California P. W. v. Blue Tent Consol. H. G. M. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391.

[27] See "Labor for Which a Lien is Given," §§ 130 et seq., ante.

[28] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

Period of alteration or other work on building extending over a long time, where the plans and specifications for the work were made as the same progressed, the court held the improvement to be an entire undertaking, and that the time for filing mechanics' liens commenced to run from the date on which the work or other alteration was actually or constructively completed: Farnham v. California S. D. & T. Co. (Cal. App., May 18, 1908), 6 Cal. App. Dec. 721, 96 Pac. Rep. 788.

Occupancy of building by owner during course of alteration thereon, where such occupancy not inconsistent with further work on the building, will not set the statute of limitations running against the filing of claim for mechanic's lien: Id.

[29] California P. W. v. Blue Tent Consol. H. G. M. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391.

vide for every contingency that may arise.[30] But, in the case of "structures," where the owner's laborer works upon the same for a specified time, it was held that he must file his claim within thirty or sixty days from the termination of the employment.[31]

§ 425. Notice of completion or cessation of work. Statutory provision. The California statute[32] provides: "The owner of any property [A] on which labor has been performed, or [B] for which materials have been furnished to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any work mentioned in section eleven hundred and eighty-three of this code, must, [1] within ten days after the completion thereof, or [2] within forty days after cessation from labor upon [a] any unfinished contract, or upon [b] any unfinished building, improvement, or structure, or [c] the alteration, addition to, or the repair thereof, file for record in the office of the county recorder of the county, or city and county, in which such property or some part thereof is

[30] See § 436, post.

[31] Weithoff v. Murray, 76 Cal. 508, 510, 18 Pac. Rep. 435. But see Malone v. Big Flat M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772. This decision is not in accord with the principle in the later case of California P. W. v. Blue Tent Cons. H. G. M. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391, that where the statute does not provide a time within which the claim must be filed, it must be filed within a reasonable time, unless inferentially "a reasonable time" be considered to be substantially the same time provided in the statute for similar cases.

[32] **Kerr's Cyc. Code Civ. Proc.,** § 1187, as amended March 27, 1897. See, generally, §§ 334 et seq., ante.

What provision requires. Owner. The provision, in terms, only requires the owner to file the notice of completion or cessation from labor, although all persons claiming an interest in said property shall be estopped, etc., by a failure of the owner to file such notice. The word "owner" applies only to the holder of the legal title or of the fee: See Hinckley v. Field's B. & C. Co., 91 Cal. 136, 138, 27 Pac. Rep. 594; Lambert v. Davis, 116 Cal. 292, 48 Pac. Rep. 123; Corbett v. Chambers, 109 Cal. 178, 182, 41 Pac. Rep. 873.

Constitutionality. There may be some question as to the constitutionality of this provision, so far as it relates to persons simply "claiming an interest" in the property, distinct from the legal title.

Notice of completion of or cessation from work not having been filed by the owner, claim of mechanic's lien may be filed at any time within ninety days from the date of the actual completion of the work: Farnham v. California S. D. & T. Co. (Cal. App., May 18, 1908), 6 Cal. App. Dec. 721, 96 Pac. Rep. 788.

situated, a notice setting forth [3] the date when [a] such building, improvement, or structure, or [b] the alteration, addition to, or repair thereof, was actually completed, or [c] in case of cessation from labor for thirty days, the date on which such cessation actually occurred, and said notice shall also contain [4] the name and [5] the nature of the title of the person who caused the said building, improvement, or structure to be erected, or said alteration, addition to, or repair to be made, and also [6] a description of the property sufficient for identification, and said notice must be [7] verified by said owner or some other person in his behalf. [C] In case any such owner neglect to file said notice as herein required, within the time herein required, then the said owner and all persons deraigning title from him, and all persons claiming an interest in said property, shall be estopped, in any proceedings brought to foreclose any mechanic's lien or liens, provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter. Said notice, when so filed for record, must be [8] recorded by the county recorder with whom the same is filed for record, and the [9] fee for recording the same shall be the sum of one dollar. . . . Provided, however, [D] that in any event all claims of lien must be filed within ninety days after [1] the completion of said building, improvement, or structure, or [2] the alteration, addition to, or repair thereof."

§ 426. **Same. Purpose and scope of provision.** The provision quoted in the last preceding section was evidently intended to remedy, in a measure, the difficulty which claimants experienced in determining when their claims should be filed; but it is not free from doubts and uncertainties. If the claim of lien, under the proviso above set out, must be filed within ninety days after the completion of the building, improvement, or structure, or the alteration, addition to, or repair thereof, the owner might set up as a defense that the same was not so filed, and the operation of the estoppel mentioned in the first part of the section would

be limited to cases other than those where the claim was filed after said ninety days.

Reason for the enactment. There is good reason for the enactment of the proviso; for, otherwise, the owner might never file the notice of completion, and the question whether there were other lien-holders entitled to share in the fund would be continually open, and there would be no limitation upon the time of filing claims and commencing suits to foreclose the liens, the advantages of which limitation having already been pointed out.[33]

Street-work, whether included. It is questionable whether the provision as to such notice applies to street-work, etc., in incorporated cities mentioned in section eleven hundred and ninety-one.[34]

Where the claim of lien was filed more than the statutory period after the filing of a notice of cessation of the work by the contractor, the work having been abandoned by the contractor in an unfinished condition, it is immaterial to urge an objection that the finding is against evidence, where the evidence shows that there was a cessation of work at an earlier date.[35]

An error in the date of a cessation from labor upon abandonment by the contractor, in a verified notice required by the statute,[36] if shown, does not prejudice claimant, if the notice was filed within the statutory time after such cessation, notwithstanding the notice is required to be verified.[37]

§ 427. **Same. Failure of owner to file notice.** The failure of the owner to file the notice of completion or cessation from labor does not indefinitely postpone the time within which claims must be filed;[38] and even though the owner fails to file such notice within the required time, subclaimants under a valid contract must file their claims within

[33] See §§ 418, 419, ante.

[34] **Kerr's Cyc. Code Civ. Proc.,** § 1191.

See Beatty v. Mills, 113 Cal. 312, 45 Pac. Rep. 468.

[35] Boscow v. Patton, 136 Cal. 90, 68 Pac. Rep. 490, upon appeal from a judgment for defendants.

[36] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[37] Boscow v. Patton, 136 Cal. 90, 68 Pac. Rep. 490.

[38] Buell & Co. v. Brown, 131 Cal. 158, 160, 63 Pac. Rep. 167.

one hundred and twenty days from cessation from work; otherwise the claim is too late.[39] In any event, the owner is not estopped to set up the fact that the claimant had not filed his claim within ninety days from the actual or statutory completion of the building, improvement, or structure, or the alteration, addition to, or repair thereof.

§ 428. Same. In case of structures. This section relates to the objects enumerated under the designation of structures.[40] Before the amendment of 1897 to section eleven hundred and eighty-seven,[41] it was held that the original contractor must file his claim of lien within sixty days after the completion of his contract, irrespective of the time when the building might be completed.[42] And the language of the section seems broad enough to cover any work done by the "original contractor," who claims a lien under the chapter relating to mechanics' liens. Before such amendment to the section, subcontractors,[43] owner's material-men,[44] con-

[39] Buell & Co. v. Brown, 131 Cal. 158, 160, 63 Pac. Rep. 167. In this case the building never was actually completed. Work stopped for thirty days, and ninety days were thereafter allowed in which to file claims of lien.

[40] See §§ 166 et seq., ante.

[41] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[42] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 232, 39 Pac. Rep. 758; Davis v. MacDonough, 109 Cal. 547, 550, 42 Pac. Rep. 450; La Grill v. Mallard, 90 Cal. 373, 374, 27 Pac. Rep. 294; White v. Soto, 82 Cal. 654, 658, 23 Pac. Rep. 210.

Idaho. Original contractor, sixty days: Bradbury v. Idaho & O. L. I. Co., 2 Idaho 239, 10 Pac. Rep. 620.

Nevada. The original contractor may file his claim of lien within sixty days: Salt Lake H. Co. v. Chainman M. & E. Co., 128 Fed Rep. 509, s. c. 137 Fed. Rep. 632 (under Cutting's Comp. Laws, § 3885).

[43] Harmon v. San Francisco & S. R. R. Co., 105 Cal. 184, 188, 38 Pac. Rep. 632; Davis v. MacDonough, 109 Cal. 547, 549, 42 Pac. Rep. 450; Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896; McLaughlin v. Perkins, 102 Cal. 502, 505, 36 Pac. Rep. 839.

[44] Schwartz v. Knight, 74 Cal. 432, 433, 16 Pac. Rep. 235; Sparks v. Butte County G. M. Co., 55 Cal. 389, 391. See Barrows v. Knight, 55 Cal. 155, 158.

Alaska. A material-man must file his claim of lien within thirty days after furnishing the materials: Jorgensen Co. v. Sheldon, 2 Alas. 607, 609 (under Civ. Code, § 266).

Colorado. Where all items of an account relate to one transaction, in a continuous account, the right to initiate a lien accrues from the date of the last item: Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744 (under act of 1883, § 30); and interruption for short periods does not destroy the continuity of the work, where there is no attempt to abandon: Id. See Small v. Foley, 8 Colo. App. 435,

tractor's material-men,[45] contractor's laborers,[46] owner's laborers,[47] and every person, save the original contractor, claiming the benefit of the chapter on mechanics' liens on real property,[48] were required to file their claims within thirty days after the actual completion of the building, improvement, or structure, or of the alteration, addition to,

447, 47 Pac. Rep. 64; and see, generally, Hart v. Mullen, 4 Colo. 512 (forty days before or after completion) (1872).

Idaho. Material-men, sixty days: Colorado I. W. v. Riekenberg. 4 Idaho 262, 38 Pac. Rep. 651.

Montana. Where materials are delivered under separate and distinct contracts, the claim should be filed within the time prescribed by the statute after the delivery under each of such contracts: Helena S. H. & S. Co. v. Wells, 16 Mont. 65, 40 Pac. Rep. 78.

The owner's material-man must file his claim within ninety days of the furnishing of the last item: Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 60 Id. 991 (under Code Civ. Proc., § 2131).

Oklahoma. Statement must be filed within sixty days after the last item of material is furnished: Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184 (under Wilson's Stats. 1903, ch. lxvi, § 4819).

Oregon. Under Hill's Ann. Laws, §§ 3673, 3678, the claim could be filed within thirty days from completion of the building, although more than thirty days from the time of furnishing the last materials: Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192; Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 167; Ainslie v. Kohn, 16 Oreg. 363, 19 Pac. Rep. 97. See Forest Grove D. & L. Co. v. McPherson, 31 Oreg. 586, 46 Pac. Rep. 884.

But see Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 172, 44 Pac. Rep. 390, which appears to hold that it may also be filed within thirty days after furnishing the last material.

[45] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 196, 20 Pac. Rep. 419 (statutory completion — acceptance, occupation, and use), s. c. 88 Cal. 20, 25, 25 Pac. Rep. 976, and 97 Cal. 263, 264, 32 Pac. Rep. 172; Santa Clara V. M. & L. Co. v. Williams. (Cal., Dec. 8, 1892), 31 Pac. Rep. 1128; Bianchi v. Hughes, 128 Cal. 24, 56 Pac. Rep. 610. See San Joaquin L. Co. v. Welton, 115 Cal. 1, 3, 46 Pac. Rep. 735, 1057; Gordon Hardware Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 621, 25 Pac. Rep. 125.

Oregon. Contractor's material-men should file their claims within thirty days after completion of the building: Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67; Ainslie v. Kohn, 16 Oreg. 363, 19 Pac. Rep. 97 (1885): and it is unimportant whether the claim was filed within thirty days after the work and materials were furnished: Id.

[46] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Leppert v. Lazar, 99 Cal. xviii, sub nom. Lippert v. Lazar, 33 Pac. Rep. 797.

[47] Keener v. Eagle Lake L. & Irr. Co., 110 Cal. 627, 631, 43 Pac. Rep. 14; Ward v. Crane, 118 Cal. 676, 679, 50 Pac. Rep. 839.

[48] Kerr's Cyc. Code Civ. Proc., § 1187; Davis v. MacDonough. 109 Cal. 547, 550, 42 Pac. Rep. 450; Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep. 840.

or repair thereof, or after the statutory completion thereof, and not within thirty days after the completion of their respective contracts. What constitutes "actual" and "statutory" completion has already been considered.[49]

§ 429. **Same. General rule.** So far as "structures" are concerned, the amendment requiring the owner to file a notice of completion or cessation from work, discussed in the preceding sections, has not changed the requirement that the said claim of lien must be filed after the actual or statutory completion of the building, improvement, or structure, or of the alteration, addition to, or repair thereof. As shown above,[50] the filing of the claim before that time is premature, and confers no right. Since the amendment of 1897 to section eleven hundred and eighty-seven,[51] all such claimants, save the original contractor, may file their claims at any time after the completion (actual or statutory) of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, and until the expiration of thirty days after the filing of said notice of completion or cessation by said owner, as set forth in the section; but "in any event [that is, even if the owner does not file notice of completion or cessation], all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or of the alteration, addition to, or repair thereof." [52]

[49] **What constitutes actual completion,** and in what cases an occupation, use, or acceptance of a building or cessation from work thereon for thirty days is the statutory equivalent of completion for the purpose of filing liens, was treated in detail in §§ 334 et seq., ante.

Where the occupation of the building by the owner is neither exclusive, nor inconsistent with a continuance by the contractor in the completion of the contract, and the owner does not act towards the contractor, in reference to the building, in such a way as by necessary implication to give notice that the building had been accepted in satisfaction of the contract, and the contractor continues the work, with full knowledge by the owner of the circumstances under which the work is being done, the statute will not be set in motion as to the time when claims should be filed, by reason of such occupation: Orlandi v. Gray, 125 Cal. 372, 374, 58 Pac. Rep. 15.

[50] See § 422, ante.

[51] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[52] This does not provide for the contingency that the original contractor may not yet have completed his contract.

§ 430. Time of filing claim. Certificate of architect. Subcontractors' claims must be filed within thirty days after the occupation or use of a building by the owner or his representative, or the acceptance thereof by the owner or his agent, notwithstanding the original contract provides for certificates of the architect stating that the instalment is due or the work completed, as the case may be, as a condition precedent to the contractor's right to demand payment, and notwithstanding the claims of lien were filed within thirty days after the final certificate of the architect.[53]

§ 431. Same. Substantial or actual completion. If, notwithstanding the trivial character of the uncompleted work, work actually continued, and was completed on a certain date, the claim of the subcontractor was required to be filed within thirty days after such actual completion,[54] before the amendment requiring the notice of completion or cessation to be filed by the owner.

§ 432. Same. Abandonment of the work. Where the contractor abandoned the work before its completion, the claim need not have been filed within thirty days thereafter, where the owner continued the work, and without occupying or accepting the building,[55] before the amendment requiring the owner to file notice of completion or cessation from work.

[53] McLaughlin v. Perkins, 102 Cal. 502, 505, 36 Pac. Rep. 839.

See "Certificates," §§ 238 et seq., ante.

[54] Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896 (dictum — before amendment of 1897).

New Mexico. Filing claim within sixty days after substantial completion: See Genest v. Las Vegas M. B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

[55] Marble Lime Co. v. Lordsburg Hotel Co., 96 Cal. 332, 335, 31 Pac. Rep. 164. In this case, by inference, the rule is deduced that unless the claim is filed within thirty days after thirty days' cessation from labor, the lien is barred. See Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 24 Pac. Rep. 648. The plaintiff in the latter case had knowledge of the cessation of work, and there was no question as to the actual cessation of labor for thirty days, or as to the meaning of those words.

Hawaii. Even if the contractor abandon the work, a materialman's time to file his claim is three months after the completion of the building: Pacific H. Co. v. Lincoln, 12 Hawn. 358, 361.

In case of an actual abandonment, the right of the owner to complete the contract, after awaiting the thirty-day suspension, is derived from the statute; but where the right of completion was given by the contract itself, and no cessation of labor for any number of days was a condition precedent to the owner's right of completion, such completion by the owner is a completion under the contract.[56]

Abandonment by contractor. Where the original contractor abandoned a valid contract, and thereupon the owner contracted with another to complete the building, it was held incumbent upon those who claim any lien by virtue of the original contract to file their claims of lien with the county recorder within thirty days after there had been a cessation from labor for thirty days upon the unfinished contract,[57] before the amendment requiring the owner to file notice of completion or cessation from labor.

§ 433. **Same. Thirty days' cessation from labor.** Claims are in time when there is a continuance of the work without a cessation of thirty days until a certain date, after which it ceased for more than thirty days, and they are filed within thirty days after the end of the thirty days from the date of the final cessation of work,[58] before the enactment of the requirement as to notice of completion or cessation from labor.

Where, on default of a building contractor, the owner, in accordance with the express terms of the valid contract, terminated the employment and completed the work, the ninety days' limitation of time to commence actions to enforce the lien prescribed by section eleven hundred and ninety [59] commenced to run against the claimant for materials furnished, to be paid for within thirty-five days after completion of the building, at the end of thirty-five days

[56] Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

[57] Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651. See Jones v. Kruse, 138 Cal. 613, 617, 72 Pac. Rep. 146.

See note 43 Am. St. Rep. 902.

[58] Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 335, 31 Pac. Rep. 164 (void contract).

[59] **Kerr's Cyc. Code Civ. Proc.,** § 1190.

from the owner's completion of the work, and not from the contractor's abandonment of it.[60]

Whether the contract is valid or void,[61] subclaimants cannot file their claims before,[62] but may do so after, thirty days' cessation from labor.[63] But when there has been a cessation from labor for thirty days upon any unfinished building, the time within which material-men or laborers must file their claims begins to run at once, and, before the amendment above referred to, if the claim was not filed within thirty days after such suspension from labor, they are not in time, and a filing within thirty days from the actual completion of the building is insufficient.[64]

§ 434. Same. Agreements affecting time of filing claims. Giving credit. Where the statutory original contract pro-

[60] Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

Doctrine of the text, while in accordance with previously decided cases, is apparently overturned by decisions handed down since the text was in type: See ante, p. 289, foot-note 117, and p. 290, foot-note 119.

As to when statute begins to run against mechanic's lien, see note 7 Am. & Eng. Ann. Cas. 947.

[61] Under a void statutory original contract, and under the provisions of § 1187 of the Code of Civil Procedure, as amended in 1887, which provided that a "cessation from labor for thirty days upon [the] unfinished building" was "equivalent to the completion" thereof so far as the filing of claims of lien was concerned, there must be such cessation, or the lien fails if the claim is filed before actual completion of the building: Jones v. Kruse, 138 Cal. 613, 617, 72 Pac. Rep. 146 (under § 1187 as amended by Stats. 1887, ch. cxxxvii, p. 154, providing "in case of contracts").

[62] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep. 840.

See § 422, ante.

[63] Reed v. Norton, 90 Cal. 590, 600, 26 Pac. Rep. 767, 27 Id. 426.

Colorado. Under the act of 1893, subclaimants were required to file their claims within thirty days from the time the structure was completed; and the structure was completed, in contemplation of law, by a cessation of labor for more than thirty days: Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83, 86.

Where there was complete cessation of work on a structure for more than thirty days after November 6, 1897, and work was then resumed December 27, 1897, and the statement of a material-man was filed December 10, 1897, the statute was satisfied: Perkins v. Boyd (Colo.), 86 Pac. Rep. 1045 (under Laws 1893, ch. cxvii, § 3, p. 318).

[64] Kerckhoff-Cuzner M. & L. Co. v. Olmstead, 85 Cal. 80, 84, 24 Pac. Rep. 648 (Works and Thornton, JJ., dissenting. In this case, the specifications were not filed, but no express statement was made that the contract was void); Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651 (valid contract). See Marble Lime Co. v. Lordsburg Hotel Co., 96 Cal. 332, 337, 31 Pac. Rep. 164 (void contract).

vided that the final payment shall be made "thirty-five days after completion and date of acceptance, provided said building and premises were free and clear from any and all liens and encumbrances arising from or created or placed thereon by said contractor, or any person claiming to have furnished him labor or materials for the erection and completion of said work," and before the thirty-five days expired the contractor filed his claim, it was held that the clause quoted was not equivalent to an express agreement that no lien should be filed by the contractor until after the expiration of the thirty-five days, the complaint having been filed after the thirty-five days; for at any time after the completion and before the expiration of the sixty days allowed by the statute to the contractor, his claim of lien may be filed, and the giving of credit for a longer time would not affect the time within which the claim must be filed.[65]

Instalments maturing during the progress of the work are not barred from foreclosure under section eleven hundred and ninety,[66] requiring liens to be foreclosed within ninety days after the filing of the claim or after the expiration of any credit given, where a subclaimant's bill was payable in instalments during the progress of the work, the last payment to be made within or before thirty-five days from completion of the building, when the action was commenced in contemplation of law before ninety days after the completion of the building, and not later than ninety days from the end of such thirty-five days.[67]

§ 435. **Same. Void contract.** Before the amendment of section eleven hundred and eighty-seven,[68] above referred to,[69] where the statutory original contract was void, the

[65] Knowles v. Baldwin, 125 Cal. 224, 226, 57 Pac. Rep. 988.

[66] **Kerr's Cyc. Code Civ. Proc.,** § 1190.

[67] Hughes v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

Colorado. An agreement extending the time to perform the contract will be construed to be an entire agreement with the first contract, and not a separate and distinct contract, so that the time within which to file claims commences to run from the date of the last work done under the extension agreement: Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. Rep. 350, s. c. 37 Colo. 265, 86 Pac. Rep. 1045.

[68] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[69] See § 425, ante.

claimant was required to file the claim at any time within thirty days after the actual completion of the building, irrespective of its previous acceptance and occupancy by the owner.[70] The distinction which was made between a void and valid statutory original contract in reference to the equivalent of completion resulting from the occupation, use, or acceptance of a building, improvement, or structure, under the peculiar language of section eleven hundred and eighty-seven,[71] providing that, "in case of contracts," such occupation, use, or acceptance should be such equivalent, is superseded by the amendment of 1897, providing that "in all cases" such occupation, use, or acceptance shall "be deemed equivalent to the completion."[72]

Where the statutory original contract is void, and the original contractor abandons the contract, and the owner starts to finish the building before a cessation of labor by the contractor for thirty days, and actually finishes the building, subclaimants were not, before the amendment, required to file their claims within thirty days after cessation of labor by the contractor for thirty days, but could file them within the statutory period after the completion of the building.[73]

Burden of determining whether any contract made, or assumed to have been made, between the owner and the original contractor is valid or not does not, generally

[70] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 208, 29 Pac. Rep. 633. **Before amendment of 1897 to § 1187** of Code of Civil Procedure, it was said by the court: "The provision of the statute that this conclusive evidence of completion shall be applicable only 'in case of contracts' makes it essential that the claimant who would invoke the provision in support of his claim of lien, filed before the actual completion of the building, shall show that at the time of such occupation or use by the owner there was a subsisting and valid contract, under which the building was being constructed. If there was no original contract for its construction, or if the one which had been actually entered into had become 'wholly void,' the condition which the statute has prescribed for the application of the exception would not exist, and the claim could not be filed until after the actual completion of the building, or until after there had been a cessation from labor for thirty days upon the unfinished building": Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 239, 29 Pac. Rep. 629.

See "Completion," §§ 334 et seq. ante.

[71] **Kerr's Cyc. Code Civ. Proc., § 1187.**

[72] See "Performance," §§ 334 et seq., ante.

[73] Pierce v. Birkholm, 115 Cal. 657, 660, 47 Pac. Rep. 681.

speaking, rest upon the claimant, when he comes to file his claim.[74]

§ 436. **Same. Mines and mining claims.**[75] The California statute[76] provides a different time for the filing of a claim of lien in case of "labor in a mining claim" than in the case of "structures," discussed in the preceding section. The claim in the former case must be filed "within thirty days after the performance of any labor in a mining claim." The provision as to filing of notice of completion or cessation[77] appears to be applicable only where a "structure" is an object under the first clause of section eleven hundred and eighty-three.[78] The provision shown to be applicable to "structures"[79] does not refer to the operation of a mine, and it has already been seen that work upon a mine may be continuous in its nature, and may have no definite completion, but may go on for fifty years or more.[80] And the proceedings for acquiring a lien upon structures are not in all respects applicable to those claiming liens upon mining claims or mines; for instance, they cannot all date back to the commencement of the work, and there is no necessary completion of the work, and there is no special thirty days thereafter within which lien-holders must record their claims of liens.[81]

[74] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 646, 22 Pac. Rep. 860.

[75] This section relates to the objects mentioned in the second clause of § 1183, **Kerr's Cyc. Code Civ. Proc.**

See, for occasions upon which the statute expressly requires a claim of lien to be filed, § 363, ante; and "Object of Labor," §§ 166 et seq., ante.

[76] **Kerr's Cyc. Code Civ. Proc.**, § 1187.

[77] **Kerr's Cyc. Code Civ. Proc.**, § 1187.

[78] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[79] See §§ 130 et seq., §§ 166 et seq., ante.

[80] See "Performance," §§ 334 et seq., ante. Of course, there may be work upon a mine not continuous in its nature.

[81] Williams v. Mountaineer G. M. Co., 102 Cal. 134, 139, 34 Pac. Rep. 702, 36 Pac. Rep. 388.

It seems that the statute, by implication, gives a lien only to material-men furnishing materials for work on a mining claim ("Nature of Property," §§ 166 et seq., ante), such liens, however, having been allowed (California P. W. v. Blue Tent Consol. H. G. M., Cal., Oct. 8, 1889, 22 Pac. Rep. 391; Williams v. Mountaineer G. M. Co., supra); the provision as to the time of filing such claims of lien expressly relates only to the "performance of any labor in a mining claim," (see §§ 149 et seq., ante), and not to the furnishing of materials for a mining claim.

Where the claimant performs labor in a mining claim, he must file his claim within thirty days after the performance of such labor.[82] When a laborer on a mine, under his contract, is to be paid by the month, or other fixed period, it is not necessary to file a claim of lien within thirty days from the end of each month, or other fixed period, but the lien must be filed within thirty days from the actual cessation of employment or work upon the mine.[83]

This provision having no application where materials are furnished for a mining claim, and the statute having stated no particular time in which to file a claim of lien in such case, it is only necessary to file it within a reasonable time.[84]

§ 437. **Same. Grading, etc.**[85] It has been held that the word "improvement," in section eleven hundred and eighty-seven,[86] which is made the subject (object) of the lien, is evidently used as equivalent to the object upon which the labor has been performed, and cannot be applied to a particular kind or class of labor performed in the erection of a building.[87] In other words, "improvement"

[82] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[83] Ah Louis v. Harwood, 140 Cal. 500, 505, 74 Pac. Rep. 41, holding that this point was so held, at least inferentially, in Malone v. Big Flat G. M. Co., 76 Cal. 578, 18 Pac. Rep. 772.

Where the laborer works by a monthly employment, it does not terminate at the end of each month, and separate notices within thirty days from the end of each month are not required, the court saying, "This assumes that each month is separate and distinct from every other month, and requires a separate notice of lien. But we do not think that this can be implied from the words, 'within thirty days . . . after the performance of any labor in a mining claim.' Upon the same reasoning, we should have to say that persons who worked by the day should file a separate notice for each day's work": Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772.

Idaho. A laborer in a mine must file his claim within sixty days after the performance of the labor, and the fact that it is not shown that the claimant had ceased to labor at the time of filing the claim to a lien for his labor does not vitiate the claim: Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 59 C. C. A. 200 (under Sess. Laws 1895, p. 48, § 6).

Nevada. See Capron v. Strout, 11 Nev. 304; Skyrme v. Occidental M. & M. Co., 8 Nev. 219.

[84] California P. W. v. Blue Tent Consol. H. G. M. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391.

See § 424, ante.

[85] Under **Kerr's Cyc. Code Civ. Proc.,** § 1191.

[86] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[87] Davis v. MacDonough, 109 Cal. 547, 551, 42 Pac. Rep. 450.

refers to the completed "objects"[88] enumerated in section eleven hundred and eighty-three,[89] and the words "buildings, mining claims, or other improvements," mentioned in section eleven hundred and eighty-eight,[90] in reference to the filing of claims against two or more of such objects, have the same significance as in section eleven hundred and eighty-three,[91] and the clause in section eleven hundred and ninety-one,[92] giving to the contractor a lien upon the "lot" which he grades, or fills, or "otherwise improves," refers to some improvement of the "lot" upon which the lien is given, rather than to the "improvements" upon the lot referred to in section eleven hundred and eighty-three.[93]

But, notwithstanding this condition of the decisions, it seems to be held that, so far as the original contractor is concerned, laying the matter of subclaimaints aside, he must file his claim of lien within sixty days after the completion of his contract for the work, under this section.[94] And although such contract may provide for a certificate that the work is done to the satisfaction of the superintendent of streets, the claim must be filed within sixty days after the completion of the contract, and not within sixty days from the giving of the certificate.[95]

[88] See "Object of Labor," §§ 166 et seq., ante.

[89] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[90] **Kerr's Cyc. Code Civ. Proc.**, § 1188.

[91] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[92] **Kerr's Cyc. Code Civ. Proc.**, § 1191.

[93] Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986. The question as to the time of filing the claim was not involved in this case.

[94] Beatty v. Mills, 113 Cal. 312, 313, 45 Pac. Rep. 468. This decision says that the claim must be filed within sixty days after the completion of the work. This, construed in the light of the facts of the case, undoubtedly means the "completion of the contract."

[95] Beatty v. Mills, 113 Cal. 312, 313, 45 Pac. Rep. 468.

CHAPTER XXII.

LIMITATIONS ON LIENS. EXTENT OF LIENS.

§ 438. Territorial or "property" extent of lien.
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§ 453. Same. Statutory provision.
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§ 456. Same. Price. Value.
§ 457. Same. Contract of subcontractor and contractor.
§ 458. Same. Claimants under subcontractors.

§ 438. Territorial or "property" extent of lien.[1] The California constitution[2] and the Code of Civil Procedure[3]

[1] See, generally, note 65 Am. St. Rep. 165.

Mechanics' liens on leasehold estate: See 2 Am. & Eng. Ann. Cas. 687; 3 Am. & Eng. Ann. Cas. 1096.

Same. Surrender does not defeat lien: See note 3 Am. & Eng. Ann. Cas. 1098.

Mechanics' liens on several lots: See notes 1 L. R. A. 514; 2 Am. & Eng. Ann. Cas. 685.

To what mechanic's lien attaches: See note 13 L. R. A. 702.

Colorado. See Colorado I. W. v. Taylor, 12 Colo. App. 451, 460, 55 Pac. Rep. 942; Seely v. Neill (Colo.), 86 Pac. Rep. 334; Perkins v. Boyd (Colo.), 86 Pac. Rep. 1045.

Montana. See Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 416.

New Mexico. See Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087, 1090.

[2] Cal. Const. 1879, art. xx, § 15, **Henning's General Laws, p. civ.**

[3] **Kerr's Cyc. Code Civ. Proc., § 1183.**

provide that the claimants named shall have a lien upon the "property" upon which they have bestowed labor or furnished materials, for the value of such labor done and [4] materials furnished. The distinction between the object upon which the labor is done and the property upon which the lien is given has been pointed out.[5]

§ 439. **Same. Statutory provision.** The statute [6] provides: "The land upon which any building, improvement, well, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if, at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, well, or structure to be constructed, altered, or repaired, but if such person owned less than fee-simple estate in such land, then only his interest therein is subject to such lien."

§ 440. **Same. Space for convenient use and occupation.** It is not an unconstitutional infringement of the rights of the citizen for the legislature to declare that the lien shall extend not only to the structure which the owner, by his own act, has made an inseparable portion of his land, but also to the land necessary for its use.[7]

The words "convenient use and enjoyment" are equivalent to the expression, "convenient use and occupation." [8]

[4] "Or," in Cal. Const. 1879, art. xx, § 15, **Henning's General Laws,** p. civ.

[5] See §§ 166 et seq., and §§ 399 et seq., ante.

[6] **Kerr's Cyc. Code Civ. Proc.,** § 1185 (amendment in effect sixty days from Feb. 23, 1899). See, generally, Newell v. Brill, 2 Cal. App. 61, 64, 83 Pac. Rep. 76.

Idaho. See Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218, 222.

Oregon. See Willamette Falls T. & M. Co. v. Riley, 1 Oreg. 183.

Utah. Lien on land to which structure has been wrongfully removed: See Sanford v. Kunkel (Utah), 85 Pac. Rep. 363, 1012.

Washington. See Lee v. Kimball (Wash.), 88 Pac. Rep. 1121.

[7] Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262. See Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.

[8] Ward v. Crane, 118 Cal. 676, 679, 50 Pac. Rep. 839.

As to lien upon well and "appurtenances," see Parke & Lacy Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 495, 82 Pac. Rep. 51.

The phrase means such space or area of land as is necessary to the enjoyment of the building for the purpose in view in its construction, and the uses to which it is to be put must manifestly, many times, determine the quantity of land necessary to the convenient use and occupation thereof;[9] and this is a question of fact, and is issuable.[10]

The liens are properly confined to the lands necessary and convenient to the use and occupation of the particular building upon which the work was done.[11]

The court may exercise its own judgment, under certain circumstances, as upon a matter of common knowledge, in determining the amount of additional land required for the convenient use and occupation of the building.[12]

§ 441. **Same. Structures. Illustrations.** The statute does not contemplate that sufficient land around a dwelling-house to support the owner while living therein shall be set apart, and it was held error to set apart forty acres of land around a dwelling-house as being required for convenient use and occupation.[13]

[9] Tunis v. Lakeport A. P. Assoc., 98 Cal. 285, 286, 33 Pac. Rep. 63; Ward v. Crane, 118 Cal. 676, 679, 50 Pac. Rep. 839.

A fair-grounds tract of about sixty acres, being a race-track, with its training-stables, grand stand, corrals, and other improvements, belonging to a certain agricultural park association, is more than necessary to the convenient use and occupation of a hotel, club-house, and saloon thereon, although these may tend to bring custom to such hotel, and the erection of such building cannot form the basis of a lien upon the entire tract: Tunis v. Lakeport A. P. Assoc., 98 Cal. 285, 287, 33 Pac. Rep. 63.

See §§ 447 et seq., post.

Railroad. Statement that twenty-five feet on each side of a railroad is necessary for the use and operation of the road, contained in claim of lien: See Bringham v. Knox, 127 Cal. 40, 44, 59 Pac. Rep. 198.

Montana. The general rule is, that the lien attaches only to the particular tract on which the labor was performed: Big Blackfoot M. Co. v. Bluebird M. Co., 19 Mont. 454, 459, 48 Pac. Rep. 778.

See note 18, post, this chapter.

New Mexico. See Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284, 285.

[10] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 211, 29 Pac. Rep. 633.

Montana. See Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413.

[11] Macomber v. Bigelow, 126 Cal. 9, 12, 58 Pac. Rep. 312.

[12] Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1080, affirmed on this point (Sup. Ct.), 89 Pac. Rep. 1081.

[13] Cowen v. Griffith, 108 Cal. 224, 226, 41 Pac. Rep. 42. In this case it was said: "The statute simply allows him a dwelling-house, and a

Where there is nothing to show that the rear portion of a lot covered by old buildings is in any way convenient or necessary to the use of the new buildings, although the void original contract embraced other buildings, yet the liens are properly confined to the buildings upon which the work was done.[14]

§ 442. Same. Land affected when building is destroyed or removed. The effect of the destruction or removal of a building upon which it is sought to impose liens for its construction has been differently regarded in various jurisdictions, depending, in some measure, upon the view of the court with reference to particular provisions of the statute, and especially with regard to the fundamental idea as to whether the lien attaches primarily to the structure or to the land. Thus where a building in course of erection is destroyed by fire without the fault of either party, and before lien filed, it has been said that the lien fails as to the building, and since there is no building, the court cannot determine that any land may be required for its convenient

quantity of land around it sufficient for its convenient use. As to his income or source of support, the statute does not concern itself. It is not our purpose to indicate to the trial court the quantity of land necessary for the convenient use and occupation of this dwelling-house, but it is entirely evident that forty acres is too much, and we think it equally evident that an entire twenty-acre tract is too much."

Colorado. Lien on "improvement" as distinct from the land: See Church v. Smithea, 4 Colo. App. 175, 35 Pac. Rep. 267 (1883).

See "Sale," § 948, post; "Fixtures," §§ 185 et seq., ante; "Property Viewed as an Entirety," §§ 447 et seq., post.

New Mexico. With reference to a ditch it was said: "All the proofs go to show that the land is appurtenant to, and to be benefited by, the ditch. The term, 'so much as may be required for the convenient use and occupation thereof,' means all the land benefited, and the value of which is increased or enhanced by the improvements actually made upon the land appurtenant and adjacent thereto, and for which such improvements are made at the instance, knowledge, or consent of the owner or reputed owner thereof. A ditch requires much more land for a convenient space, use, and occupation than a house, wall, or fence, and a lien will attach for the construction of either": Ford v. Springer L. Assoc., 8 N. M. 37, 59, 41 Pac. Rep. 541. It was admitted in the pleadings in this case that twenty-two thousand acres of land were appurtenant. Same case affirmed, Springer L. Assoc. v. Ford, 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170.

See §§ 447 et seq., post.

[14] Macomber v. Bigelow, 126 Cal. 9, 12, 58 Pac. Rep. 312.

use, and hence no lien attaches to the land upon which it was constructed.[15]

§ 443. Same. Mines and mining claims. If labor or materials have gone into a building or other structure, the lien attaches: 1. To the structure; 2. To the ground upon which it stands; or 3. To the interest therein of the person who caused the structure to be erected, and to a space about it sufficient for its convenient use or occupation, that being deemed — and rightly so — the property created or improved. In case of labor or material contributed to the development or working of a mine, the lien extends to the whole mine, and the rule, though expressed in different terms, is in effect the same; for mining claims have always been restricted by the rules and customs of miners prior to the enactment of the mining laws, and since that time by the laws themselves, to what is regarded as a reasonable quantity of placer-ground, and in case of lode claims to so much only of the ground adjacent to the lode as is required for convenient working. The statute, therefore, does not in reality contain two rules for determining what is subject to mechanics' liens. It contains but one rule, and that the rule of the constitution, which fastens a lien upon the prop-

[15] Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75.

See note on this point, 2 Am. & Eng. Ann. Cas. 689-691.

New Mexico. If, after a mechanic's lien is filed, the structure is destroyed by fire, the lien upon the land does not fail: Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726. The court say: "We are well aware that the rule of law as to whether a mechanic's lien for improvements made on a lot can be recovered when such improvements are destroyed, is held differently in the different states; those states which follow the law as laid down in Pennsylvania holding that such a recovery cannot be had, while states which do not follow Pennsylvania — and it seems to us that they base their opinions on the better reasoning, and are in greater number — hold to the contrary rule," citing Gaty v. Casey, 15 Ill. 189; Steigleman v. McBride, 17 Ill. 300; Ellett v. Tyler, 41 Ill. 449; Schwartz v. Saunders, 46 Ill. 18; Paddock v. Stout, 121 Ill. 571, 13 N. E. Rep. 182; Smith v. Newbaur, 144 Ind. 95, 42 N. E. Rep. 40, 1094, 33 L. R. A. 681; Clark v. Parker, 58 Iowa 509, 12 N. W. Rep. 553; Freeman v. Carson, 27 Minn. 516, 8 N. W. Rep. 764; McLaughlin v. Green, 48 Miss. 175; Stuart v. Broome, 59 Tex. 466.

Utah. The land on which the building is erected by the owner is liable to the lien, even though the building is removed to another lot without the knowledge of the owner: Sanford v. Kunkel (Utah), 85 Pac. Rep. 363, 1012.

erty improved or benefited; and oil claims, being within the reason as well as the letter of the law, are, as they should be, governed by the same rule, and the lien attaches to the entire claim, and such lien would attach to a claim of eighty acres, which is half the size permitted by law to be located as a consolidated claim.[16]

Adjacent non-mineral land. The lien on a mining claim, however, does not extend to adjacent land which is not mineral in character.[17]

§ 444. Same. Several mining claims. In consonance with the rules laid down in the preceding sections, and as an illustration of the principles and reasoning therein discussed, where several claims or locations are owned and operated as one mine, as against the parties so uniting them they may, for the purpose of the lien, be regarded and treated as a single claim.[18]

[16] Berentz v. Belmont O. M. Co., 148 Cal. 577, 583, 84 Pac. Rep. 47, 113 Am. St. Rep. 308, **reversing** on this point (Cal. App.), 84 Pac. Rep. 42.

[17] Bewick v. Muir, 83 Cal. 368, 372, 23 Pac. Rep. 389, 390.

See "Object," §§ 166 et seq., ante.

Idaho. Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 397, 59 C. C. A. 200; Phillips v. Salmon R. M. & D. Co., 9 Idaho 149, 72 Pac. Rep. 886.

Oregon. See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996.

[18] Hamilton v. Delhi M. Co., 118 Cal. 148, 151, 50 Pac. Rep. 378; Tredinnick v. Red Cloud Consol. M. Co., 72 Cal. 78, 84, 13 Pac. Rep. 152; and see Malone v. Big Flat G. M. Co., 76 Cal. 578, 583, 18 Pac. Rep. 772.

Colorado. The lien for work on a mill does not extend to certain lode mining claims, being separate and distinct pieces of realty: Colorado I. W. v. Taylor, 12 Colo. App. 451, 55 Pac. Rep. 942, 945.

Idaho. See Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 74 Pac. Rep. 958.

Montana. Lien to the extent of one acre was not given upon a lode mining claim, because the law gave a lien on the quartz-lode: Smith v. Sherman M. Co., 12 Mont. 524, 31 Pac. Rep. 72; Big Blackfoot M. Co. v. Bluebird M. Co., 19 Mont. 454, 458, 48 Pac. Rep. 778. See Alvord v. Hendrie, 2 Mont. 115, and Davis v. Alvord, 94 U. S. 545, bk. 24 L. ed. 283, modifying the same.

A number of non-contiguous lode claims, large tracts of non-mineral land, town lots, water rights, etc., cannot be included in one statement or proceeding: Big Blackfoot M. Co. v. Bluebird M. Co., supra; especially when not under one contract: Id.

Non-contiguous land may be included under one continuing contract: Id. 458; Helena etc. Co. v. Wells, 16 Mont. 65, 40 Pac. Rep. 78.

Nevada. Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632.

Land and reduction-works a unity: See Gould v. Wise, 18 Nev. 253, 3 Pac. Rep. 30.

§ 445. Same. Mining machinery. Under the express provisions of section eleven hundred and eighty-three,[19] the lien extends to "the works owned and used by the owners for reducing the ores from such mining claim or claims or real property so worked as a mine."

Before the amendment of 1907 to section eleven hundred and ninety-two,[20] mining machinery placed upon a mine, under a contract by which it retained its status as personalty, did not become a part of the realty, and was not subject to mechanics' liens for work done upon the mine;[21] and a person performing labor in a mining claim for the assignees of a vendee, by virtue of a contract that if the vendee failed to purchase the mine as agreed, he could remove certain mining apparatus placed by him on the mine above-ground, secures no lien upon such personal property, although permanently affixed to the mine, where the machinery is leased by a third person to the vendee with the option of purchase, and the lessor need not give notice of ownership of such personal property, where the option to purchase was not exercised.[22]

[19] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[20] **Kerr's Cyc. Code Civ. Proc.,** § 1192, as amended Stats. 1907, p. 577, **Kerr's Stats. and Amdts. 1906-07,** p. 481.

[21] Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061. See Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107.

[22] Jordan v. Myres, 126 Cal. 565, 58 Pac. Rep. 1061 (decided in 1899). "**The general rule is, as to sales upon execution,** that the purchaser acquires thereby only such title and interest as the judgment debtor had, and the rule is the same whether the sale follows the lien of attachment or is upon execution without such lien; and the rule also applies at sales under foreclosure of mortgages upon real estate — the purchaser ordinarily takes the risk of title: Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561. We cannot see in what way the sale upon foreclosure of a mechanic's lien can be said to carry any greater interest than the owner of the property had at the time the lien attached, whatever may be the rule as to a bona fide purchaser or mortgagee of the land without notice. In the case before us, the owner of the mine never had any interest in the personal property, and he acquired no interest in it, as against appellant, by its being affixed to the realty: Hendy v. Dinkerhoff, supra; and appellant's lessees expressly reserved the right to remove this machinery. It must result that respondent secured no lien upon this personal property by virtue of the statute, for he could only have a lien upon the property of the owner of the mine. Any other view of the matter would, we think, greatly retard development, especially of mining property, where it often becomes necessary for the owner or his lessee to borrow or hire the use of machinery, which, for the time being, in order to utilize it, must be affixed to the realty. No one would have the temerity to

Effect of amendment of 1907. The amendment of the statute, however, has changed this rule, under certain conditions, by requiring the filing of the lease for record, or the posting of a notice of non-responsibility. As thus amended, section eleven hundred and ninety-two [23] provides: "And all mining machinery placed upon or in any mining claim or claims, or real property used as a mine, under a lease or other agreement by the terms of which such machinery shall not lose its identity as the personal property of the lessor, and which is used in the operation and working of such mining claim or claims, or real property used as a mine, shall be deemed to be a fixture attached to such mining claim or claims, or real property used as a mine, for the purposes only of the lien hereinbefore mentioned, and shall be subject to such lien, unless such lessor shall within ten days after such machinery shall have been delivered at such mining claim or claims, or real property used as a mine, file and record such lease or other agreement in the office of the county recorder of the county in which such machinery shall be used as aforesaid; or within said ten days shall post a notice in some conspicuous place in some building on said mining claim wherein said machinery is to be used, stating therein that said machinery is the property of said lessor and has been leased or contracted to be sold to the person operating said mine, and that said machinery will not be liable for any lien provided for in this chapter."

loan or hire machinery to another person for such purposes if he had to take the risk of losing his property through the liens of laborers or material-men working in or supplying material to the mine. The courts find no difficulty in upholding the rights of a vendor under a conditional sale of personal property as against the creditors of the vendee, for the reason that the title remains in the vendor; and we can see no reason why the rule should not be the same where the owner of the personal property hires or leases it. The fallacy of respondent's position is in assuming that the situation of the personal property in its relation to the realty is the sole criterion by which to judge of its character; whereas 'the intention with which an article of personal property is attached to the realty, whether for temporary or permanent improvement, has, within certain limits, quite as much to do with the determination of the question whether it has thereby become a permanent fixture, as has the way and manner in which it is attached': 1 Jones on Mortgages, § 429": Jordan v. Myres, 126 Cal. 565. 569, 58 Pac. Rep. 1061.

[23] **Kerr's Cyc. Code Civ. Proc., § 1192, as amended 1907, Kerr's Stats. and Amdts. 1906-07, p. 481.**

§ 446. Same. Grading and other work. Lot. The statute [24] provides that the person grading or doing certain other work upon a lot in an incorporated city shall have a lien upon the lot. Under this section the lien is not limited to any artificial subdivision upon the surface of the earth, or to any official designation upon the map, but its meaning includes whatever territory is owned by the person, which he may cause to be graded under a single contract, and may include two blocks of land in a city, which were held to be a "lot" within the meaning of the section.[25]

§ 447. Property viewed as an entirety.[26] The property, viewed as an entirety, or the relation of the object upon which the work is done to the "property" subject to the lien, is closely akin to the subject last discussed. In the preceding sections,[27] the matter was considered from the point of view of the extent of land; in this place it will be regarded from the point of view of whole and part, or the property contemplated as a structural unity.[28]

[24] **Kerr's Cyc. Code Civ. Proc.,** § 1191.

[25] Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986.

Oregon. "The word 'lot,' when applied to real estate, is indefinite in its dimensions, but is a portion of land that has been set off or allotted, whether great or small. . . . The legislature must have intended to use the term 'lot' in the sense of a city as contradistinguished from a rural lot." It is to be understood, in the sense of a city lot, as bounded and described on the recorded plats of the city, or as subdivided and bounded by conveyances of the owners themselves, or by other acts done by themselves or the city authorities in exercising the right of eminent domain in opening and establishing streets; but no lien was given for grading a ten-acre tract in a city: Pilz v. Killingsworth, 20 Oreg. 432, 433, 26 Pac. Rep. 305 (construing "lot" as used in § 3676, Hill's Code, similar to § 1191, **Kerr's Cyc. Code Civ. Proc.**).

[26] See, generally, as to buildings and other property subject to mechanics' liens, note 78 Am. Dec. 694.

[27] See §§ 438 et seq., ante.

[28] It has already been seen that the claim of lien should, in general, be filed against a structure as an entirety: See §§ 399 et seq., ante. This discussion may therefore seem a repetition; but the thing against which the claim of lien must be directed is not necessarily the entire thing to which the lien extends: See "Object," §§ 166 et seq., ante.

Colorado. Where several structures erected on a lot of land are designed for a united enjoyment, the law treats them as a unit in relation to the liens which it gives, and although the work was performed on one, the lien extends to the whole lot: Cary H. Co. v. McCarty, 10 Colo. App. 200, 218, 50 Pac. Rep. 744. See Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64.

Oregon. As to structures upon separate parcels of land, see Willamette S. M. L. & M. Co. v. Shea, 24 Oreg. 40, 32 Pac. Rep. 759.

The general rule with reference to the subject discussed in this section is, that the lien extends to the structure as an entirety.[29]

Railroad. Thus the lien extends to an entire railroad, and not merely to the section of the road on which the work was done.[30]

Machine. So where a machine becomes a fixture, the work done upon and materials furnished for it are regarded as done and furnished for the building or structure.[31]

Lien on portion of a structure. There is no provision for a lien upon a portion of a building, or for the sale of a part of a building to satisfy a lien upon the whole.[32]

[29] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 211, 29 Pac. Rep. 633. See Ellison v. Jackson W. Co., 12 Cal. 542, 554; Horn v. Jones, 28 Cal. 195, 204.

Montana. The lien is not restricted, as against a lessor, to the precise materials furnished, but extends to the entire building erected by the lessee: Montana L. & Mfg. Co. v. Obelisk M. & C. Co., 15 Mont. 20, 37 Pac. Rep. 897.

New Mexico. Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284, 285.

Oregon. So the lien was given upon a mill for work done upon a dam, or breakwater attached thereto; for a mill made to run by hydraulic power would be worthless without the structures necessary to secure and obtain the water, and the labor bestowed upon such structures is of the same utility and importance to the owner of the mill as the labor put into the mere building. Whatever enters into or is connected with the mill, essential to its use, ought to be treated, under the statute, as a part of said mill: Willamette Falls T. & M. Co. v. Remick, 1 Oreg. 169.

Utah. Where lumber is delivered under one contract, for structures all erected on the same piece of ground, to be used together in prosecuting the business of smelting, a lien exists upon the entire premises for the lumber used in each structure, and one lien can be created thereon for the security of the entire bill: Salt Lake L. Co. v. Ibex M. & S. Co., 15 Utah 440, 49 Pac. Rep. 832.

[30] Cox v. Western Pac. R. Co., 44 Cal. 18, 28; Bringham v. Knox, 127 Cal. 40, 43, 59 Pac. Rep. 198. See Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

As to application of mechanics' liens to railroads, see 7 Am. & Eng. Ann. Cas. 269.

Oregon. But see Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470, 474, 8 L. R. A. 700, and see note 34, this chapter, post.

Lien may filed against an extension of a railroad only: Ban v. Columbia S. R. Co., 117 Fed. Rep. 21, **reversing** s. c. 109 Fed. Rep. 499.

See § 449, post.

[31] Donahue v. Cromartie, 21 Cal. 80, 86.

See "Fixtures," §§ 95, 185 et seq., ante.

New Mexico. Post v. Miles, 7 N. M. 317, 327, 34 Pac. Rep. 586.

[32] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 211, 29 Pac. Rep. 633; Brunner v. Marks, 98 Cal. 374, 33 Pac. Rep. 265.

Colorado. See Small v. Foley, 8 Colo. App. 434, 443.

Washington. Wright v. Cowie, 5 Wash. 341, 31 Pac. Rep. 878.

§ 448. **Same. Distinct objects on one parcel of land.** In the case of "structures," where the labor is done and material is furnished by subclaimants for a separate and distinct object of the labor, which is part of that to be performed under an original contract, the lien is confined primarily to the object upon which the particular work was done. Thus where liens are claimed by subclaimants for labor done and materials furnished in the improvement and construction of additions to an old building, upon part of the lot, although the contract includes the erection of another and new building upon another part of the same lot upon which other liens are claimed, the former liens properly extend to the old building only.[33]

§ 449. **Same. Railroads, canals, gas-works and water-works.** It is sometimes difficult, within the rules laid down in the preceding sections, to determine what the "structure as an entirety" is, especially in the case of railroads, canals, gas-works and water-works, and the like, where a number of structures and connecting links may be involved, each case depending for its solution upon its own peculiar facts; and the subject is full of peculiar difficulty.[34] With refer-

[33] Brunner v. Marks, 98 Cal. 374, 376, 33 Pac. Rep. 265.

As to material furnished for group of buildings, see 2 Am. & Eng. Ann. Cas. 683.

[34] In this connection the supreme court (speaking of Cox v. Western Pac. R. Co., supra), has said: "Under the facts shown, the lien could not attach to a portion of the road, and the court said: 'It would render the statute absurd to hold that one contractor or subcontractor could acquire a lien upon a bridge, another upon a tunnel, and a third upon a culvert, all of which constitute portions of a railroad.' The contention of appellants would require a lien for erecting a depot building to replace one destroyed by fire, or a bridge washed away by flood and belonging to a company operating a railroad already completed and in operation, to claim a lien upon the entire system, however extensive, of which the depot or bridge formed a part. But we do not think this is the correct meaning of the statute: Hill v. La Crosse & M. R. Co., 11 Wis. 223, 80 Am. Dec. 783, where a lien was upheld upon a railroad depot building and the lot on which it stood; Purtell v. Chicago F. & B. Co., 74 Wis. 132, 42 N. W. Rep. 265, where a lien upon a railroad bridge was held good. So far as any principle found in Midland R. Co. v. Wilcox, 122 Ind. 84, 23 N. E. Rep. 506, may have any analogy to the principle involved here, that case seems to me unfavorable to appellant's contention. The railway company owned the line from Anderson to Lebanon, only a portion of which (Anderson to Noblesville) was completed and in operation; from Noblesville to Lebanon it was incomplete and was under construction. For the

ence to railroads, many of the cases are based upon the particular language of the state statutes; some upon the

work on this latter section the lien was filed, and on this section alone. The lien was sustained on the uncompleted portion of the road. Of the cases dealing with water-works, gas-works, and the like, that of National F. & P. Works v. Oconto Water Co., 52 Fed. Rep. 43, affirmed 59 Fed. Rep. 19, is a fair illustration. The lien claimant had furnished the pipe for the water system of the city of Oconto, which had been laid in the streets and connected with the pumping-works and well of defendant. This and like cases are examples of continuous and contemporaneous works, and are also examples where, of the works comprising the 'structure,' each is useless without the other, or where they are so interdependent and intimately related that they must be regarded as an entirety.

"Here, however, the Bear Valley reservoir had been in use long before the Santa Ana canal [upon divisions 1 and 2 of which the lien was claimed] was projected, and so also had the Alessandro pipe line [running from division 2 to the end of the proposed division 3]. The division 3 of the projected canal was graded in disconnected parts, but there remained yet to be obtained rights of way, without which completion was impossible, and finally work on this division was abandoned, and the whole property passed into the hands of receivers, and no work has been done on this division since September, 1893, so far as we know. We find no case among those cited by appellants parallel in its facts with the case before us, and no principle upon which their view of the matter can be upheld.

" Respondent relies upon South Fork Canal Co. v. Gordon, 73 U. S. (6 Wall.) 561, bk. 18 L. ed. 894, as conclusive against appellants' contention that the lien should extend over the Alessandro pipe line. Just why appellants should insist that respondents are entitled to no lien at all because they have asked it on too little of appellants' property might challenge inquiry. But, aside from this, we think the facts here bring the case within the principles discussed and decided in the case last cited. From a reservoir near Placerville a canal or flume extended to the South Fork of the American River — about twenty-five miles. When the contract with Gordon was entered into, the flume was completed from the reservoir to Long Canon — eleven and two thirds miles. Water flowing through it was used by means of several outlets for mining purposes. It was fed from sources other than the South Fork. Gordon s contract was for the extension of this canal. The work commenced where the existing work ended, and reached to the South Fork of the American River, the object being to make use of that river as a feeder, and to increase the water-supply. They were distinct works, as having been completed at different times and by different contractors, and the upper section had already been in use. The points of identity were continuity and a common object, use, and ownership. The court below held that Gordon had a lien on the entire length of the canal. On appeal, the supreme court reversed the decree, holding that the lien extended only to that portion of the canal constructed by him. The Alessandro pipe line was already in use, and was fed by water from Mill Creek; it was no part of the plan to supply this pipe from the canal — on the contrary, the plan was to abandon the pipe line. Besides, it was totally inadequate to carry the water of the canal, and would have been useless when the canal was completed, unless used to carry the water of Mill Creek, in which case it would have been distinct from the canal. . . . We cannot perceive upon what principle the lien should be made com-

ground of public policy supposed to exist in certain states against giving a lien upon different sections of a railroad, and upon the theory that it is an entirety, and that there can be no severance or dislocation of the road as a unit.

pulsory as to division 3, or why it should be lost entirely because not claimed on the pipe line. Division 3 is not only incomplete, but there remain rights of way to be obtained, without which the surveyed line and the work done have no value or utility. No one can say that it ever will be completed, and if so completed, it yet remains to complete division 4, to make division 3 of value. The pleadings and liens [with two aspects — against divisions 1, 2, and 3, and against divisions 1 and 2] would justify our holding that this division might be included, but we see no reason for compelling plaintiff to so extend its claim; nor do we see any legal ground upon which to do so": Pacific R. M. Co. v. Bear Valley Irr. Co., 120 Cal. 94, 99, 101, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

The materials were furnished for divisions 1 and 2, and the judgment foreclosed the lien on divisions 1 and 2. The defendant let the work by separate contracts on each of the divisions, and not by an entire contract for the whole work. This case contends that no doubt was cast by Brooks v. Burlington & S. W. R. Co., 101 U. S. 443, bk. 25 L. ed. 1057, on South Fork Canal Co. v. Gordon, supra. See also Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470, 474, 8 L. R. A. 700.

Colorado. See Arkansas River L. R. & C. Co. v. Flinn, 3 Colo. App. 381, 383, 33 Pac. Rep. 1006 (canal), (1889).

Idaho. Separate and distinct canal built subsequently to main canal, and part of a system of canals, held subject to the lien, independently of the rest of the system: Creer v. Cache Valley C. Co., 4 Idaho 280, 38 Pac. Rep. 653, 95 Am. St. Rep. 63.

Nevada. Unconnected mines: See Salt Lake H. Co. v. Chainman M. & E. Co., 137 Fed. Rep. 632.

Oregon. A single lien upon separate buildings is allowed when they are erected for any common purpose or connected use, as in the case of barns, stables, and other outhouses within the curtilage of a dwelling, and used in connection with it, or where the buildings have been erected for some general and connected use: Willamette S. M. L. & M. Co. v. Shea, 24 Oreg. 40, 47, 32 Pac. Rep. 759; Willamette Falls Co. v. Remick, 1 Oreg. 169, 170. See Dalles L. & M. Co. v. Wasco Woollen M. Co., 3 Oreg. 527 (under an early statute giving a lien upon "the building" upon which the labor was done).

In Pacific Rolling Mills Co. v. James Street Construction Co., 68 Fed. Rep. 966, 970, 16 C. C. A. 68, 29 U. S. App. 698, it was contended that material furnished for a street-railway could form the basis of a lien upon the power-house. The court, however, said: "It is said that the road and power-house are one, and indissolubly connected; that the cable-railway is incapable of operation, except in connection with the power-house wherein the cable is operated, and whereby all the movements of cars is accomplished; that the road without the power-house, and the power-house without the road, are equally important to accomplish results, and that notwithstanding the fact that the appellant has furnished no material for the power-house, it has a lien thereon, from the fact that it has furnished material for the railway track, which is so intimately and necessarily connected therewith. . . . In a certain sense, it is true that the cable-road in the street and the power-house on the lots are so intimately connected that the one may be said to be appurtenant to the other. But, by the terms of the

§ 450. Same. Lien on building alone. False representations as to ownership. When a contractor falsely represents himself to his subclaimants as the owner of the land, they have a right of lien only against the building for which they have furnished labor or materials, and the structure may be severed and sold, in the absence of any showing that

statute [1 Hill's Code, §§ 1663, 1665], no reference is made to appurtenances, and no lien is expressly created therefor, and there is nothing in its provisions, or in the interpretation given thereto by the state courts, to justify the court now in holding that it contemplates a lien upon a building, or upon the lot upon which it stands, for materials furnished in the construction of appurtenances not included in the contract for the construction of the building, nor situate upon land in which the owner of the building has an interest. The cases relied upon by the appellant's counsel come short of sustaining the doctrine on which his contention rests. In Beatty v. Parker, 14 Mass. 523, 526, 6 N. E. Rep. 754, a drain-pipe, extending from the cellar of a house through the cellar-wall and the yard and the street into a sewer, the construction of which was included in the contract for building the house, was held to be a part of the house, and it was held that a lien was provided therefor under the lien law, and that it was immaterial that the title to the street is not in the owner of the house. But the decision was based upon the fact that a portion of the drain-pipe was in and was a part of the house on which the lien was attempted to be enforced, and was included in the contract for its construction. In this respect the facts differ materially from those in the case at bar. In Badger L. Co. v. Marion W. S., E. L. & P. Co., 48 Kan. 182, 29 Pac. Rep. 476, 15 L. R. A. 652, it was shown that the defendant company owned land on which was a building and machinery for generating electricity to be used in connection with its electric wires and poles, which it had placed through the streets, under a franchise therefor. The plaintiff furnished poles to support the wires in the streets. It was held that he had a lien on the lots on which the building and machinery were situated, but it was so expressly decided under the language of the Kansas statute, which provided liens for materials furnished to 'any building, or to the appurtenance of any building'; and it was found by the court that the wires and poles were appurtenances to the building. But in Parmalee v. Hambleton, 19 Ill. 614, in a case where a house, and vault under the sidewalk of a street, were constructed under a single contract, it was held that the vault, although an appurtenance to the house, was not subject to a mechanic's lien, under a statute which conferred a lien upon any one who, under a contract with the owner of a lot, should furnish 'labor or materials for erecting or repairing any building or the appurtenances of any building on such land or lot.' The court said: 'This certainly means that both the building and appurtenance should be upon the lot.'"

In Giant Powder Co. v. Oregon Pacific R. Co., 42 Fed. Rep. 470, 474, 8 L. R. A. 700, it was said: "If the effect of the transaction is to give the plaintiff a lien on the whole road, it may sell the whole road. But my own judgment is, that, even if the plaintiff might claim a lien upon the whole road, it may, nevertheless, limit its lien by its notice to the part or section of the road for the construction of which it furnished the material." See also Ban v. Columbia S. R. Co., 117 Fed. Rep. 21, 54 C. C. A. 407, **reversing** s. c. 109 Fed Rep. 499.

its removal would in any wise injure the land. It is only when the land belongs to the person who caused the building to be constructed, or who had an interest therein, that such land or interest may also be charged, the lien on the building being the principal thing.[35]

§ 451. Same. Mining claims and mines. In considering the question of the extent of the lien, "mining claims" and mines must be carefully distinguished from "structures."[36] The statute[37] provides that any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, has a lien upon the same, and the works owned and used by the owners for reducing the ores from said mining claim or claims, or real property so worked as a mine, for the work or labor done or materials furnished by each, respectively.[38]

The general rule in reference to mining claims is, that the lien extends to the claim as an entirety, and that a lien cannot be filed against a portion thereof; for example, the portion upon which the work was done or for which the materials were furnished, as the pit, shaft, or quarry alone.[38] A lien, likewise, cannot be claimed upon a structure which is part of a larger structure, or part of the entire property in a mining claim; the lien extends to and must be filed upon

[35] Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.

[36] Pacific R. M. Co. v. Bear Valley Irr. Co., 120 Cal. 94, 98, 52 Pac. Rep. 136, 65 Am. St. Rep. 158; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 139, 34 Pac. Rep. 702, 36 Id. 388.

See § 182, ante.

Montana. See Big Blackfoot M. Co. v. Bluebird M. Co., 19 Mont. 454, 458, 48 Pac. Rep. 778.

[37] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[38] Helm v. Chapman, 66 Cal. 291, 292, 5 Pac. Rep. 352, 5 West Coast Rep. 127.

Material-man not limited to separate structure in mining claim on which the repairs were made, but he has a lien upon the whole mining claim for the materials to be used and actually used on the same: Silvester v. Coe Q. M. Co., 80 Cal. 510, 511, 22 Pac. Rep. 217.

Colorado. Lien allowed on whole mining property for labor and material in constructing a house contiguous to and for use of mine: Keystone M. Co. v. Gallagher, 5 Colo. 23 (1872).

Oregon. But as to tramway, mill, and mine not being an "entire" structure, so as to require claim against mine also for work on mill and tramway, see Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994.

the whole mining claim, and not only to the mill, tramway, boarding-house, and reduction-works upon the claim.[39]

§ 452. The lien as limited by contract.[40] This section and the following one relate not only to original contracts, but also to contracts of all lien claimants. It has already been fully shown [41] that where there is a valid original contract subclaimants are bound by the terms, covenants, and conditions of the same.[42] It is not intended at this point to discuss

[39] Williams v. Mountaineer G. M. Co., 102 Cal. 134, 138, 34 Pac. Rep. 702, 36 Id. 388. See Hamilton v. Delhi M. Co., 118 Cal. 148, 151, 50 Pac. Rep. 378; Tredinnick v. Red Cloud Consol. M. Co., 72 Cal. 78, 84, 13 Pac. Rep. 152; Malone v. Big Flat G. M. Co., 76 Cal. 578, 583, 18 Pac. Rep. 772; Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

See §§ 130 et seq., §§ 185 et seq., ante.

Oregon. See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996.

[40] See also §§ 45 et seq.; "Subcontractor," §§ 66 et seq.; "Materialman," §§ 77 et seq.; "Laborers," §§ 104 et seq.; "Valid Contract," §§ 286 et seq.; "Effect of Validity of Contract," §§ 315 et seq.; and "Abandonment," § 358, ante. See Chappius v. Blankman, 128 Cal. 362, 365, 60 Pac. Rep. 925.

Colorado. See Groth v. Stahl, 4 Colo. App. 8, 30 Pac. Rep. 1051; Ditto v. Jackson, 3 Colo. App. 281, 282, 33 Pac. Rep. 81.

Lien claimed as against the interest of a minor: See Seely v. Neill (Colo.), 86 Pac. Rep. 334.

Receiver. Claimants furnishing labor or materials for a receiver of a mine are presumed to know whether or not he possesses the powers which he assumes to exercise; and the expenses of a receiver, even if he was acting under an order of court specifically empowering him to carry on such business, cannot be satisfied out of the property, to the prejudice of those holding prior subsisting liens: Hendrie & B. Mfg. Co. v. Parry (Colo.), 86 Pac. Rep. 113.

Hawaii. See Hackfeld v. Hilo R. Co., 14 Hawn. 448, 451.

[41] See preceding note.

[42] See "Valid Contract," §§ 286 et seq., ante; Walsh v. McMenomy, 74 Cal. 356, 359, 16 Pac. Rep. 17; Dingley v. Greene, 54 Cal. 333, 336; Henley v. Wadsworth, 38 Cal. 356, 361 (1862); Bowen v. Aubrey, 22 Cal. 566. See Wilson v. Barnard, 67 Cal. 422, 423, 7 Pac. Rep. 845. But see Quale v. Moon, 48 Cal. 478, 482.

In Willamette Steam Mills Lumber and Manufacturing Co. v. Los Angeles College Co., 94 Cal. 229, 237, 29 Pac. Rep. 629, it is said: "It is only 'in case of a contract for the work,' duly filed, that the amount of the lien is limited by the contract price." This makes the rule applicable to statutory original contracts, and narrows it more than the decisions justify; but, limiting the language to the matter discussed, namely, the effect of the invalidity of the contract, its meaning is clear. See Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726; Brill v. De Turk, 130 Cal. 241, 244, 62 Pac. Rep. 462.

Colorado. See Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

Utah. See Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781; Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1009.

Washington. But see Bell v. Groves, 20 Wash. 602, 56 Pac. Rep 401.

in detail the subject here considered, as it is elsewhere treated from other points of view, and reference thereto is made in the notes.

§ 453. Same. Statutory provision. The statute [43] provides that "in case of a contract for the work between the reputed owner and his contractor, the liens shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price, and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor." [44]

§ 454. Same. General interpretation of provision. Where nothing is due to the original contractor under valid statutory original contract, by reason of full payments under its terms, the interest of the owner of the structure therein is not subject to a lien.[45] No lien exists in favor of subclaimants beyond the amount due under the terms of a valid contract.[46] The aggregate amount of liens, so far as the

[43] **Kerr's Cyc. Code Civ. Proc.,** § 1183, as amended Stats. 1903, p. 84.

[44] It has been held, under a previous statute, that if there is no existing lien on a valid original contract, none exists on the subcontracts: Dingley v. Greene, 54 Cal. 333, 336; Dore v. Sellers, 27 Cal. 588, 594, 596.

See § 272, ante. But see "Impairment of Lien," § 284, ante.

[45] See Blinn L. Co. v. Walker, 129 Cal. 62, 61 Pac. Rep. 664.

[46] O'Donnell v. Kramer, 65 Cal. 353, 4 Pac. Rep. 204; Turner v. Strenzel, 70 Cal. 28, 30, 11 Pac. Rep. 389. See Nason v. John, 1 Cal. App. 538, 540, 82 Pac. Rep. 566.

Colorado. Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789; McIntyre v. Barnes, 4 Colo. 285. See Charles v. Hallack L. & M. Co., 22 Colo. 283, 295, 43 Pac. Rep. 548.

Hawaii. The lien in favor of the subcontractor is not limited to the amount payable under the original contract to the principal contractor: Allen v. Redward, 10 Hawn. 151, 154; Pacific H. Co. v. Lincoln, 12 Hawn. 358, 362.

Nevada. Contra, under act of 1875: Lonkey v. Cook, 15 Nev. 58; Hunter v. Truckee Lodge, 14 Nev. 24, 25, where it was held that subclaimants had direct liens, regardless of payments made to the original contractor prior to the time within which the law required notice of their claim to be recorded. (This follows the "Pennsylvania system," as distinguished from the "New York system," the latter being followed in California, where there is a valid contract.)

New Mexico. Contra, Hobbs v. Spiegelberg, 3 N. M. 222, 357, 5 Pac. Rep. 529 (same principle as Nevada).

Oregon. See Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708, 75 Id. 710.

owner's liability is concerned, must not exceed the price as fixed by the valid original contract.[47]

§ 455. **Same. Contract as notice.** This subject has been more fully considered in another place, and what was there said will not be repeated here.[48] A contract either to lease a mine, the property of an estate, or to hire a person to work the same, which is signed by a person as executor, without authority of court, if it is notice of anything, is notice of everything it contains, and would be notice to the contractor's laborers, sufficient to prevent a lien upon the mine, if known.[49]

§ 456. **Same. Price. Value.** The phrase in section eleven hundred and eighty-three,[50] that subclaimants shall have a lien "for the value" of the labor performed or materials furnished, is not used in contradistinction to "price" or "agreed value." It was not the intention that the contractor, material-man, or laborer who contracts for a certain sum should have a lien for a greater sum, upon the ground that the value of what he did or furnished is greater. "It is probably true that where a subcontractor, material-man, or

Washington. The Nevada and New Mexico rule was followed under the code of 1881, and the California rule was rejected: Spokane Mfg. & L. Co. v. McChesney, 1 Wash. 609, 21 Pac. Rep. 198.

Wyoming. See Davis v. Big Horn L. Co., 14 Wyo. 517, 85 Pac. Rep. 980.

[47] Whittier v. Wilbur, 48 Cal. 175, 177; Wilson v. Barnard, 67 Cal. 422, 423, 7 Pac. Rep. 845; Dore v. Sellers, 27 Cal. 588, 594 (1862); Pacific M. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758. See Wiggins v. Bridge, 70 Cal. 437, 439, 11 Pac. Rep. 754; Gibson v. Wheeler, 110 Cal. 243, 245, 42 Pac. Rep. 810; California I. C. Co. v. Bradbury, 138 Cal. 328, 330, 71 Pac. Rep. 346, 617. See also "Notice," §§ 547 et seq., post.

See §§ 284, 285, ante.

Oregon. But see Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996 (under Hill's Ann. Laws, § 3678; liability on payments made by owner to others than persons furnishing labor or materials for the structure).

Utah. Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781. See Morrison & M. Co. v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784; Teahan v. Nelson, 6 Utah 363, 23 Pac. Rep. 764.

[48] See § 316, ante.

[49] Chappius v. Blankman, 128 Cal. 362, 364, 60 Pac. Rep. 925.

[50] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

laborer agrees with the original contractor for more than he is entitled to, upon the understanding between them that it shall be made out of the property, there would be such a fraud as would vitiate the claim. But, aside from such a case, we think that the word 'value,' as used in section eleven hundred and eighty-three,[51] is to be construed so as to mean 'agreed value.'" [52]

§ 457. Same. Contract of subcontractor and contractor. In speaking of the contracts of subcontractors, the supreme court has said: "Are the employees of the subcontractor subject to all the conditions that may be created by the account between the contractor and the subcontractor? If the account is consistent with the terms of the contract entered into between the contractor and the subcontractor, and payment has not been prematurely made, there can be no doubt that the employees of the subcontractor are not entitled to demand from the contractor or employer an amount exceeding the sum then due the subcontractor according to his agreement with the contractor. . . . The contrary doctrine cannot be true, unless it can be demonstrated that a party who has fully complied with the terms of his agreement can be held responsible for an amount exceeding the amount he agreed to pay. The mere fact that a portion of the work was done and the materials furnished by the employees of the subcontractor could not entitle him to receive, either directly or indirectly, through payments to his employees, a greater sum than he would have been entitled to had he personally performed all the labor and furnished the materials in performance of the subcontract." [53]

[51] **Kerr's Cyc. Code Civ. Proc., § 1183.**

[52] Jewell v. McKay, 82 Cal. 144, 150, 23 Pac. Rep. 139.

Utah. Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781. And in the absence of a special contract fixing the value of the services, etc., the limit of the lien would be the reasonable value of the services: Id.

Washington. "While it is true that the owner of the building would not be bound by the contract made between his contractor and the subcontractor, if it was shown to be fraudulent or improvident, yet, in the absence of such showing, it must be presumed that the contract is such as would be enforced by the courts": Spears v. Lawrence, 10 Wash. 368, 371, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789.

[53] Dore v. Sellers, 27 Cal. 588, 594. It was also said (p. 595): "The

§ 458. **Same. Claimants under subcontractors.** If the contractor has paid the subcontractor according to the terms of his valid contract with him before notice duly given him by the subclaimants, under an early statute the claimants under the subcontractor were not entitled to demand anything from the contractor or owner, nor to enforce a lien.[54] It seems that in all cases, and notwithstanding the fact that the statutory original contract may be void, subclaimants are bound by the terms of their own subcontracts.[55]

statute, for the protection of employees, holds the payment made before it fell due according to the terms of the contract void as against the unsatisfied claims of the employees; but if payment has been made according to the terms of the contract, and before the material-man or laborer has given notice of his claim according to law, we find no provision in the statute holding the employer or the original contractor liable for the payment of such claim, and certainly there is no rule of the common law leading to such a result." There seems to be no provision in the present statute, however, for giving notice by employees of subcontractors to an original contractor.

See "Notice to Owner," §§ 547 et seq., post.

[54] Dore v. Sellers, 27 Cal. 588, 595. See Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312.

As to state of account between original contractor and his subcontractor, who asserts a lien upon the fund in the hands of the owner, see Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 2 Cal. App. 303, 304, 83 Pac. Rep. 292.

Montana. But see Merrigan v. English, 9 Mont. 113, 22 Pac. Rep. 454, 5 L. R. A. 837; Alvord v. Hendrie, 2 Mont. 115.

Oregon. See Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Rep. 656, with reference to railroads (under Laws 1889, p. 75).

[55] See "Rights of Subcontractors," §§ 70 et seq., ante, and "Void Contract," §§ 319 et seq., ante.

CHAPTER XXIII.

LIMITATIONS ON LIENS (CONTINUED). ESTATES AND INTERESTS SUBJECT TO LIENS.

I. By Contract.

§ 459. Plan of discussion.
§ 460. Estates or interests bound by contractual relation with the holder thereof. Statutory provision.
§ 461. Same. General rule.
§ 462. Same. Fee or legal title subject to lien.
§ 463. Same. Vendee being in possession.
§ 464. Same. Lessee being in possession.
§ 465. Same. Title being held in trust.
§ 466. Same. Interest of vendee in possession bound.
§ 467. Same. Interest of lessee bound.
§ 468. Same. Homestead bound.

I. BY CONTRACT.

§ 459. Plan of discussion. In this chapter we shall consider the estates and interests in lands which are subject to mechanics' liens by contract, and in the following chapter those by estoppel, where no question of priority as between such estates or interests arises. In the succeeding chapter, on priorities, the relative rights of the owners of such estates or interests, as between themselves, as well as with reference to liens for labor performed upon or materials furnished for the property, will be treated in detail. The discussion here will naturally include a brief reference to the subject of agency for the owner, in regard to which subject, later on, an extended development will be required; and, also, and under this general head in the following chapter, the topic of notice of non-responsibility provided for by several statutes will opportunely find a place.

Uncertainty of cases as to principle of decision. It may be suggested, moreover, that the cases have not always clearly pointed out upon what principle the decision is rendered, where the statute provides for notice of non-responsibility; and it is difficult, at times, to determine

whether the basis of the judgment is merely the agency — actual, ostensible, or statutory — of the person causing the improvement to be made, in behalf of the owner, or under the principle of statutory estoppel by failure to post such notice of non-responsibility.

§ 460. **Estates or interests bound by contractual relation with the holder thereof. Statutory provision.** In the sections immediately following, we will consider estates and interests as affected by contract with the owner directly, or through his agent, actual or ostensible. Section eleven hundred and eighty-five [1] provides: "The land upon which any building, improvement, well, or structure is constructed, . . . is also subject to the lien, if, at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, well, or structure to be constructed, altered, or repaired, but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien." [2]

[1] **Kerr's Cyc. Code Civ. Proc.,** § 1185.

As to estates or interests bound by estoppel, see §§ 469 et seq., post.

[2] Lothian v. Wood, 55 Cal. 159, 160.

Under construction given to act of 1855-56, it was held that a mechanic's lien might be had upon whatever interest the person had, who caused the superstructure to be made. If the party owned only the superstructure, then the lien would attach only to that; but if he also owned the land, the lien would embrace it also, and any interest in the land which might be held under execution would be subject to such a lien: McGreary v. Osborne, 9 Cal. 119, 123.

As to rights of licensee, see Marchant v. Hayes, 120 Cal. 137, 138, 49 Pac. Rep. 840, 52 Id. 154; and Eaton y. Rocca, 75 Cal. 93, 95, 16 Pac. Rep. 529.

As to authority of guardians, trustees, executors, and others acting in a representative capacity to confer right to mechanic's lien, see note 61 Am. Dec. 691.

As to "building contracts," agreement of sale, effect on mechanic's lien, see note 61 Am. Dec. 689.

As to creation of right to mechanic's lien by minors and others under personal disability, see note 61 Am. Dec. 693.

As to estates or interests affected by mechanic's lien, see notes 45 Am. Dec. 678; 13 L. R. A. 702.

As to equitable estate being chargeable with mechanic's lien, see notes 45 Am. Dec. 678; 61 Am. Dec. 690.

As to mechanic's lien on grantee of contracting owner, see note 61 Am. Dec. 699.

As to mechanic's lien on homestead property, see note 9 L. R. A. 805.

Statutory agency. The provision of the law creating statutory agency will be considered hereafter.[3]

§ 461. Same. General rule. The general rule is, that whatever interest the person causing the work to be done or materials to be furnished had in the land is subject to the liens,[4] whether the improvement is caused by him

As to mechanic's lien on leasehold estates, see notes 3 Am. & Eng. Ann. Cas. 1096; 45 Am. Dec. 678.

As to mechanic's lien on interest of lessees and tenants for life, see notes 45 Am. Dec. 678; 61 Am. Dec. 697.

As to mechanic's lien in case of joint tenants and tenants in common, see note 61 Am. Dec. 691.

As to power of tenant to bind fee, see note 61 Am. Dec. 698.

As to who has such ownership or relation to property that he can bind it by mechanic's lien, see note 61 Am. Dec. 688.

As to what interest or estate mechanic's lien attaches, see notes 13 L. R. A. 702; 45 Am. Dec. 678.

[3] See, generally, "Agency," §§ 572 et seq., post.

Arizona. Same principle: Bremen v. Foreman, 1 Ariz. 413, 25 Pac. Rep. 539 (under Comp. Laws, p. 248, § 4).

Colorado. Tritch v. Norton, 10 Colo. 337, 15 Pac. Rep. 680 (1881); Shapleigh v. Hull, 21 Colo. 419, 41 Pac. Rep. 1108.

New Mexico. See Post v. Miles, 7 N. M. 317, 326, 34 Pac. Rep. 586 (interest in the improvement).

Utah. As to contracting directly with owner (act of 1890, § 1), see Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238.

Lien on ditch. So the lien attaches to a right of way of a ditch, obtained under U. S. Rev. Stats., §§ 2339, 2340, 7 Fed. Stats. Ann. 1090, 1096, as the work progresses: Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 34 Pac. Rep. 368.

Washington. See Cutter v. Striegel, 4 Wash. 346, 30 Pac. Rep. 326.

Ditch. No ownership in land. Where there is no ownership of or interest in the land through which the ditch is constructed, there is no lien: Nelson v. Clerf, 4 Wash. 405, 30 Pac. Rep. 716.

Street-railway. Likewise of a street-railway: Front Street C. R. Co. v. Johnson, 2 Wash. 112, 25 Pac. Rep. 1084, 11 L. R. A. 693; Pacific R. M. Co. v. James Street Const. Co., 68 Fed. Rep. 966, 968, 16 C. C. A. 68, 29 U. S. App. 698.

Building separate from land. And there can be no lien upon the building separate from the land whereon the same is situated: Kellogg v. Littell & S. Mfg. Co., 1 Wash. 407, 408, 25 Pac. Rep. 461; Pacific R. M. Co. v. James Street Const. Co., 68 Fed. Rep. 966, 968, 16 C. C. A. 68, 29 U. S. App. 698.

Community property: See Sagmeister v. Foss, 4 Wash. 320, 30 Pac. Rep. 80, 744; Littell & S. Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. Rep. 1035.

Interest of wife: See Anderson v. Harper, 30 Wash. 378, 70 Pac. Rep. 965.

[4] Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 495, 82 Pac. Rep. 51 (owners of well).

Idaho. Lien limited to the interest of the employer in the property: See Idaho G. M. Co. v. Winchell, 6 Idaho 729, 59 Pac. Rep. 533, 96 Am. St. Rep. 290.

directly or through his agent, actual or ostensible.[5] Such interest may be the fee-simple title, and the fee may be subject to certain estates or interests, such as leases and the like, and the estates or interests last mentioned may, under certain circumstances, be likewise subject to the lien. These matters will be treated in detail in the following sections.

§ 462. Same. Fee or legal title subject to lien. The fee or legal title, by virtue of the provision of the statute already discussed, and heretofore quoted in full,[6] under the

Utah. Unless the person causing the improvement to be made had some interest in the land, no lien attaches to the improvement; for the latter is to be taken as appurtenant merely: Eccles L. Co. v. Martin (Utah), 87 Pac. Rep. 713, 715, 716 (under Rev. Stats. 1898, tit. xxxix, ch. i). See Sanford v. Kunkel (Utah), 85 Pac. Rep. 1012, and Morrison v. Clark, 20 Utah 432, 59 Pac. Rep. 235, 77 Am. St. Rep. 924.

Washington. Baker v. Sinclaire, 22 Wash. 462, 61 Pac. Rep. 170 (under Ballinger's Ann. Codes and Stats., § 5901). The clause in 2 Ballinger's Ann. Codes and Stats., § 5901, referring to the person owning less than the fee, relates to the person who caused the work to be done or materials to be furnished: Northwest B. Co. v. Tacoma S. Co., 36 Wash. 333, 78 Pac. Rep. 996.

[5] See "Agency," §§ 572 et seq., post. See also "Estoppel," §§ 469 et seq., post. The amendment of 1903 to **Kerr's Cyc. Code Civ. Proc.**, § 1183, provides that every person having charge of a mining claim, "either as lessee or under a working bond or contract thereon, with the privilege of purchase, or otherwise, shall be held to be the agent of the owner for the purposes of this chapter."

[6] § 460, ante. Hinckley v. Field's B. & C. Co., 91 Cal. 136, 139, 27 Pac. Rep. 594. See Worden v. Hammond, 37 Cal. 61, 65 (1862).

See §§ 469 et seq., post.

Compare: Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

Arizona. See Bremen v. Foreman, 1 Ariz. 413, 25 Pac. Rep. 539; Eaman v. Bashford, 37 Pac. Rep. 24, **following** Moore v. Jackson, 49 Cal. 109.

Colorado. Interest of co-tenant contracting only: Mellor v. Valentine, 3 Colo. 260.

Contracting with others than owner does not affect the lien: Id. Contract must be with owner or agent: Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458 (co-tenants).

Interest of grantee, deed in escrow: Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989.

Montana. See Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

Washington. So where the lessee makes repairs by authority of the lessor (that is, as the latter's agent): Sheehan v. Winehill, 18 Wash. 447, 51 Pac. Rep. 1065. So where the contract between the lessor and lessee, while in effect a lease, is a building contract, the cost to be paid by the owner by way of rents remitted: Kremer v. Walton, 16 Wash. 139, 47 Pac. Rep. 238; s. c. 11 Wash. 120, 39 Pac. Rep. 374.

general rule announced in the last preceding section, may be bound and charged with the lien.

In a mining claim, if the person claiming to act as agent is not employed as such by the owner, who has no knowledge of the work being done upon it, and he exercised ordinary care in the premises, no lien can be imposed upon the premises.[7]

§ 463. Same. Vendee being in possession. When a person is in possession of land under a contract with the owner, the terms of which are sufficient at the general law to constitute such person the agent, actual or ostensible, of the owner, for the purpose of making the improvement, the latter must be deemed to have caused the improvement to be made, and resort need not be had to the failure of the owner to post notice of non-responsibility, hereafter to be discussed, in order to affect such owner's interest with liability for liens in the making of the improvement. Upon this principle, liens have been allowed against the interest of the owner, where a vendee was in possession, and made improvements, under a contract of sale providing for such improvements, expressly or impliedly, under circumstances giving rise to the relation of agency between the vendee and vendor for the purpose of making the improvement.[8]

[7] Donohoe v. Trinity Consol. G. & S. M. Co., 113 Cal. 119, 123, 45 Pac. Rep. 259 (the employer apparently having no interest in the property). The discussion involved only questions of agency, and notice of non-responsibility was not referred to. See amendment of 1903 to § 1183, **Kerr's Cyc. Code Civ. Proc.** (Stats. 1903, p. 84), purporting to make lessee or vendee agent of owner. See § 473, post.

Colorado. See Tritch v. Norton, 10 Colo. 337, 15 Pac. Rep. 680 (1881).

Oregon. A stranger or intermeddler could not thus encumber the property of another: Cross v. Tscharnig, 27 Oreg. 47, 39 Pac. Rep. 540.

[8] **In Moore v. Jackson**, 49 Cal. 109, 111, a vendee in possession made repairs by permission of the owner, and it was held that claimants had a lien, even if the vendee did not carry out the contract of purchase. The ground was that the vendee was the "agent" of the owner, within the meaning of the first section of the act of 1868, containing provisions similar to those of § 1183, **Kerr's Cyc. Code Civ. Proc.**, and not upon the ground of estoppel or knowledge of the owner, as provided in the fourth section of the act, similar to § 1192, **Kerr's Cyc. Code Civ. Proc.** See §§ 469 et seq., post, where the relation considered is not contractual, but by way of estoppel.

In Guy v. Carriere, 5 Cal. 511, 513 (1850), the vendee was in possession under an oral agreement of sale, and it was said that the owner of the "land could create a lien upon the property," and that the vendee had no rights to be affected.

§ 464. Same. Lessee being in possession. Under the principle that the interest of the person causing the work to be done or materials to be furnished, in the land, is bound by the lien, whether the contract therefor was made by such person or through his actual or ostensible agent, as discussed in the last preceding sections, where a lease of mining claims provides that the owner should be paid a certain portion of the net profits of the proceeds from working the mine, and that the lessees should prosecute the work of mining, before section eleven hundred and eighty-three [9] was amended in 1903, said section made the lessees the owner's agents, and those performing labor in the development of the property, or to facilitate the extraction of ore, discovered or undiscovered, or in the extraction of the ore, had a lien for such labor upon the interests of the lessees and the owner.[10]

See "Notice of Non-responsibility," § 473, post.

Arizona. Where a vendee was in possession under an option to purchase, which provided that the vendee should work a mine at his own expense, the bullion to be placed to the credit of the owner as collateral security for the purchase price, and upon the default of certain payments the purchaser was to vacate the property, the vendee's laborers have no lien upon the interest of the owner, under Rev. Stats., §§ 2276, 2278, 2280; but only on that of the vendee, there being no agency for the owner: Hadley Co. v. Cummings, 7 Ariz. 258, 64 Pac. Rep. 443.

On lease of mine. Likewise with reference to a lease of a mine, the interest of the lessee is alone liable: Griffin v. Hurley, 7 Ariz. 399, 65 Pac. Rep. 147.

See "Agency," §§ 572 et seq., post.

Colorado. Where the vendee, under the terms of the contract, is not only authorized but required to operate, develop, and improve a mine, lien claimants have a lien upon the interest of both the vendor and vendee: Hendrie & B. Mfg. Co. v. Holy Cross G. M. & M. Co., 17 Colo. App. 341, 68 Pac. Rep. 785; Shapleigh v. Hull, 21 Colo. 419, 41 Pac. Rep. 1108; Colorado I. W. v. Taylor, 12 Colo. App. 451, 55 Pac. Rep. 942.

Contract to perform labor upon a mine, upon the completion of which the laborer is to have an interest in the property, does not constitute him the owner or agent of the owner, within the meaning of 3 Mills's Ann. Stats., 1st ed., § 2867, giving a lien against the interest of the owner: Maher v. Shull, 11 Colo. App. 322, 327, 52 Pac. Rep. 1115. See Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 487, 809 (vendor).

But this doctrine will not be used to disturb vested rights and valid encumbrances: Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 184.

[9] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[10] Higgins v. Carlotta G. M. Co., 148 Cal. 700, 702, 84 Pac. Rep. 758, 113 Am. St. Rep. 344.

Arizona. The erection of a bar and other saloon fixtures in a leased building, at the instance of the leaseholder, does not give a

§ 465. Same. Title being held in trust. Where claimants are ignorant of the existence of a contract with an executor, unauthorized by order of court, and the title to a mine stood in his individual name upon the records of the county as a resulting trust for an estate which he was administering in another county, laborers are not chargeable with notice of the probate proceedings as fixing the legal status of the mine, but are protected in their liens for work done in actual ignorance of the rights of the estate, as encumbrancers for value without notice of the trust, within the meaning of the statutory provision.[11]

lien against the interest of the owner: Gates v. Fredericks, 5 Ariz. 343, 52 Pac. Rep. 1118 (under Rev. Stats., § 2258).

Colorado. Where the lease provides only for a certain improvement on a mine, such as the erection of a mill, which, upon the expiration of the lease, is to become the property of the lessor, the claimant must show that he has furnished material for or performed labor upon the particular improvement set forth in the lease: Antlers Park R. M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226.

Under a lease in which the lessor has no interest, the interest of the lessor is not subject to the lien, even where he was employed as a book-keeper for the lessee, and acted as the agent of the lessee in and about the property, and did not notify the claimants as to his true relation to the property: Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340 (the question of estoppel was eliminated by failure to plead).

Amendment of 1895. Effect of. The fact that the mechanic's-lien law provides that the owner of the fee shall be liable unless he leases the mine in small blocks of ground to one or more sets of lessees does not enlarge or extend the provision, making it applicable to owners not thus leasing their lands: Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612 (under Sess. Laws 1895, § 8, p. 200).

Nevada. Rosina v. Trowbridge, 20 Nev. 105, 121, 17 Pac. Rep. 751. See Dickson v. Corbett, 11 Nev. 277 (lessor).

Oregon. The interest of the owner is not subject to a mechanic's lien for labor performed for a lessee under a lease recorded before the work was begun: Lewis v. Beeman, 46 Oreg. 311, 80 Pac. Rep. 417 (under Bellinger and Cotton's Ann. Codes and Stats., § 5668). See Stinson v. Hardy, 27 Oreg. 584, 41 Pac. Rep. 116.

Lien of contractor against the interest of an estate lessor; work ordered by lessee and assigns of lessee: See Hobkirk v. Portland B. Club, 44 Oreg. 605, 77 Pac. Rep. 776.

Washington. But otherwise if the lessee causes the improvement to be made, and is not the agent of the owner: Stetson-Post M. Co. v. Brown, 21 Wash. 619, 627, 59 Pac. Rep. 507, 75 Am. St. Rep. 862.

See "Agency," §§ 572 et seq., post.

[11] **Kerr's Cyc. Civ. Code,** § 856. See Chappius v. Blankman, 128 Cal. 362, 365, 60 Pac. Rep. 925.

As to authority of persons in trust relation or representative capacity to confer right to mechanic's lien, see note 61 Am. Dec. 691.

Oregon. Legal estate in the trustees of a church bound by their contract, notwithstanding the deed to the trustees provided that the

§ 466. Same. Interest of vendee in possession bound. Under the general rule laid down in the preceding sections, the equitable interest of the employer in possession under a contract of sale is subject to the lien to secure the indebtedness incurred by himself for materials furnished or labor performed in the construction or other work provided for in the statute with reference to the objects therein enumerated.[12]

§ 467. Same. Interest of lessee bound. Under the general rule stated in a preceding section,[13] the interest of a lessee of property may be bound by a lien for materials

proceeds, if the land be sold, should be disposed of according to the discipline of the church: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390; Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454 (through agent).

Wyoming. As against any other person, however, without notice of the trust, or the equitable interest of the cestui que trust, who purchases the same from the trustee, or obtains a lien thereon by mortgage or by operation of law, such as a mechanic's lien, dealing with the trustee in good faith, for a valuable consideration, who is to all intents and purposes the full owner, such third person takes it discharged of the trust. In this case a decedent died after erecting buildings on land of another, and his administratrix purchased the land and took a deed thereof in her own name, using the estate's funds for that purpose, and rebuilt the building after its destruction by fire, using the insurance-money belonging to the estate; the interest of the heir was held bound to the person who, without notice of the rights of the estate, supplied labor and materials for the building, and filed a mechanic's lien therefor: Seibel v. Bath, 5 Wyo. 409, 40 Pac. Rep. 756.

[12] Crowell v. Gilmore, 13 Cal. 54, 56; Hinckley v. Field's B. & C. Co., 91 Cal. 136, 139, 27 Pac. Rep. 594.

See authorities in preceding note.

Colorado. See Shapleigh v. Hull, 21 Colo. 419, 41 Pac. Rep. 1108 (lien extends to both interests of vendor and vendee, where latter contracts upon express authority or requirement of vendor); Colorado I. W. v. Taylor, 12 Colo. App. 451, 55 Pac. Rep. 942; Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989. See also Antlers Park R. M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226.

Idaho. See Steel v. Argentine M. Co., 4 Idaho 505, 42 Pac. Rep. 585, 95 Am. St. Rep. 144.

Utah. Carey-Lombard L. Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572 (1890).

Washington. Iliff v. Forssell, 7 Wash. 225, 34 Pac. Rep. 928; Mentzer v. Peters, 6 Wash. 540, 541, 33 Pac. Rep. 1078. See St. Paul & T. L. Co. v. Bolton, 5 Wash. 763, 32 Pac. Rep. 787 (obligee under bond to convey). Where the rights of the vendee are forfeited and lost, there is nothing upon which the lien of the claimant can attach: Mentzer v. Peters, supra. See also Baker v. Sinclaire, 22 Wash. 462, 61 Pac. Rep. 170 (under Ballinger's Ann. Codes and Stats., § 5901).

[13] § 461, ante.

furnished for or labor performed upon a structure which the lessee caused to be erected.[14] Thus laborers on a mine

[14] West Coast L. Co. v. Newkirk, 80 Cal. 275, 278, 22 Pac. Rep. 231; Lothian v. Wood, 55 Cal. 159, 164; Johnson v. Dewey, 36 Cal. 623, 624 (1862). See Barber v. Reynolds, 33 Cal. 497, 503; West Coast L. Co. v. Apfield, 86 Cal. 335, 340, 24 Pac. Rep. 993; Crowell v. Gilmore, 13 Cal. 54, 56; Harlan v. Stufflebeem, 87 Cal. 508, 510, 25 Pac. Rep. 686; Central L. & M. Co. v. Center, 107 Cal. 193, 194, 197, 40 Pac. Rep. 334; Jones v. Shuey (Cal., April 3, 1895), 40 Pac. Rep. 17.

See "Fixtures," §§ 189 et seq., ante, and §§ 469 et seq., post.

Arizona. Claimants furnishing materials or doing labor for a lessee have a lien upon the interest or estate of the lessee, but not against the estate of the lessor, unless it be shown that the lessee was acting, so far as the claimant is concerned, as the agent, either in fact or in law, of the lessor; mere knowledge on the part of the lessor that the lessee is working the property, or even permission or an agreement on the part of the lessor that the lessee may work the mine, will not alone constitute the lessee such agent of the lessor: Bogan v. Roy (Ariz.), 86 Pac. Rep. 13, 15; Gates v. Fredericks, 5 Ariz. 343, 52 Pac. Rep. 1118; Hadley Co. v. Cummings, 7 Ariz, 258, 64 Pac. Rep. 443.

Colorado. Cary H. Co. v. McCarty, 10 Colo. App. 200, 210, 50 Pac. Rep. 744. See same case for license coupled with an interest.

Where contract is made by and for benefit of lessee of a mine, and not under a contract made with the owner of the property, or one acting by his authority as agent or contractor, claimants have no lien against the interest of the owner: Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612 (under § 8, as amended by Sess. Laws 1895, p. 202); Williams v. Eldora-Enterprise M. Co. (Colo.), 83 Pac. Rep. 780; Morrell H. Co. v. Princess G. M. Co., 16 Colo. App. 54, 63 Pac. Rep. 807 (under 3 Mills's Ann. Stats., 1st ed., § 2873); Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843.

Mining lease with option to purchase, nudum pactum, converted into an enforceable contract of sale on payment of part of purchase price: See Williams v. Eldora-Enterprise G. M. Co. (Colo.), 83 Pac. Rep. 780.

A contract made by or for the benefit of the lessee of the mine with claimant not the basis of a lien, under Sess. Laws 1895, p. 202 (3 Mills's Ann. Stats., 1st ed., § 2873): Morrell H. Co. v. Princess G. M. Co., 16 Colo. App. 54, 63 Pac. Rep. 807.

Under a lease for ordinary development-work, by the terms of which the vendor was to receive a stipulated rental in the nature of a royalty, with an option of purchase, there being no requirement that the purchaser should make any improvements or do any work on the mine, no lien can be enforced against the interest of the owner for work or materials performed or furnished for the vendee: Williams v. Eldora-Enterprise G. M. Co. (Colo.), 83 Pac. Rep. 780; Maher v. Shull, 11 Colo. App. 322, 52 Pac. Rep. 1115; Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843; Little Valeria M. & M. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. Rep. 970; Antlers Park R. M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226.

Montana. Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991; Stenberg v. Liennemann, 20 Mont. 457, 52 Pac. Rep. 84, 63 Am. St. Rep. 636; Montana L. & Mfg. Co. v. Obelisk M. & C. Co., 15 Mont. 20, 37 Pac. Rep. 897; Pelton v. Minah Consol. M. Co., 11 Mont. 281, 28 Pac. Rep. 310; Block v. Murray, 12 Mont. 545, 31 Pac. Rep. 550.

Compare: Beck v. O'Connor, 21 Mont. 109, 53 Pac. Rep. 94.

have a lien upon the interest of the lessee, with whom they have contracted.[15]

Under the act of 1862, which did not provide for any notice by the owner upon receiving knowledge of the construction of a building upon his land (such as is contained in section eleven hundred and ninety-two [16]), it was held that where the building was erected by a lessee, although with the knowledge of the lessor, the interest of the lessee alone was liable, since he "caused" the building to be erected, by entering into a contract with the claimant.[17] But where

New Mexico. Post v. Miles, 7 N. M. 317, 329, 34 Pac. Rep. 586.

Oregon. Mathiesen v. Arata, 32 Oreg. 342, 344, 50 Pac. Rep. 1015, 67 Am. St. Rep. 535; Allen v. Rowe, 19 Oreg. 188, 23 Pac. Rep. 901 (under mining act, Laws 1891, p. 76); Stinson v. Hardy, 27 Oreg. 584, 41 Pac. Rep. 116 (citing Montana cases, supra).

Utah. Morrow v. Merritt, 16 Utah 412, 52 Pac. Rep. 667; Ellis v. Brisacher, 8 Utah 108, 29 Pac. Rep. 879.

Washington. Bell v. Groves, 20 Wash. 602, 56 Pac. Rep. 401; Kremer v. Walton, 16 Wash. 139, 47 Pac. Rep. 238, s. c. 11 Wash. 120, 39 Pac. Rep. 374; Masow v. Fife, 10 Wash. 528, 39 Pac. Rep. 140; Harrington v. Miller, 4 Wash. 808, 31 Pac. Rep. 325; Stetson-Post M. Co. v. Brown, 21 Wash. 619, 627, 59 Pac. Rep. 507, 75 Am. St. Rep. 862; Owen v. Casey (Wash., March 13, 1908), 94 Pac. Rep. 473.

[15] Berentz v. Belmont O. M. Co., 148 Cal. 577, 580, 84 Pac. Rep. 47, 113 Am. St. Rep. 308, **reversing** upon this point (Cal. App.) 84 Pac. Rep. 47.

[16] **Kerr's Cyc. Code Civ. Proc.,** § 1192.

[17] Johnson v. Dewey, 36 Cal. 623, 624. The same expression, "caused said building . . . to be constructed," is to be found in § 1185, **Kerr's Cyc. Code Civ. Proc.,** which is similar to § 4 of the act of 1862: Worden v. Hammond, 37 Cal. 61, 65 (1862), in which it was likewise held that the interest of the vendor under a contract of sale was not subject to a lien. See Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 213, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174, and discussion under head of "Constitutional Aspects," §§ 28 et seq., ante; Eaton v. Rocca, 75 Cal. 93, 16 Pac. Rep. 529; Guy v. Carriere, 5 Cal. 511, 513 (1850); Avery v. Clark, 87 Cal. 619, 628, 29 Pac. Rep. 919, 22 Am. St. Rep. 272; §§ 459 et seq., ante, and notes. But see Soule v. Dawes, 14 Cal. 247, 250; and Moore v. Jackson, 49 Cal. 109, 111.

Arizona. Same principle: Gates v. Fredericks, 5 Ariz. 343, 52 Pac. Rep. 1118.

Colorado. See Evans v. Young, 10 Colo. 316, 15 Pac. Rep. 424, 3 Am. St. Rep. 583; United M. Co. v. Hatcher, 79 Fed. Rep. 517, 25 C. C. A. 46, 49 U. S. App. 139, **reversing** Hatcher v. United States L. Co., 75 Fed. Rep. 368 (Cir. Ct.).

Montana. See Stenberg v. Liennemann, 20 Mont. 457, 52 Pac. Rep. 84, 63 Am. St. Rep. 636; Montana L. & Mfg. Co. v. Obelisk M. & C. Co., 15 Mont. 20, 23, 37 Pac. Rep. 897; Pelton v. Minah Consol. M. Co., 11 Mont. 281, 28 Pac. Rep. 310; Block v. Murray, 12 Mont. 545, 31 Pac. Rep. 550.

Utah. So where the lease provided for the erection of improvements by tenant: Morrow v. Merritt, 16 Utah 412, 52 Pac. Rep. 667, **citing** Johnson v. Dewey, 36 Cal. 623.

the lessor's interest is not otherwise affected, it seems that the lien generally attaches, subject to the conditions of the lease.[18]

Washington. See Bell v. Groves, 20 Wash. 602, 56 Pac. Rep. 401, where it was held that the improvements erected by a lessee of a vendee, who had forfeited his right under an unrecorded contract, which provided that in case of forfeiture the improvements should remain, are subject to the lien of the lessee's material-man who has no notice of such contract, and who believes the building is owned by the lessee, the vendor having knowledge of the construction, and not giving notice of his rights, and not declaring a forfeiture after the materials had been furnished. But where a bond for a deed has been recorded, and there is no estoppel, the rule is otherwise: Bell v. Groves, supra; St. Paul L. & T. Co. v. Bolton, 5 Wash. 763, 32 Pac. Rep. 787. And so the interest of the owner is not liable, even though he stated, after nearly all the materials had been furnished, that he would see that the person fraudulently representing himself to be the lessee should pay the claimant, there being no promise on his part to pay, nor any consideration for such promise, if it was made, and the claimant was not induced to furnish such materials by such statement; and while, possibly, if there had been a purchase of such leasehold interest by the owner, such interest would merge in the fee-simple title charged with the lien growing out of the furnished materials, yet where all the rights under the lease had been forfeited, and the owners took possession of the property, and at the same time purchased of such lessee the improvements which had been placed thereon, there would be no such merger in the fee as would permit the operation of any such rule: Masow v. Fife, 10 Wash. 528, 39 Pac. Rep. 140.

See note 12, this chapter, supra.

[18] Gaskill v. Trainer, 3 Cal. 335, 340 (1850). There must be a formal demand made on the day when the rent becomes due, to create a forfeiture; and a waiver of this demand will not be implied; and the surrender of the leasehold interest, although it otherwise operates as a merger in the fee, yet it cannot be suffered to defeat the rights of a third party, which intervened before the merger took place: Id. In this case, however, the statute did not provide for giving notice to the owner, and the question of estoppel did not arise.

See §§ 469 et seq., post; "Priorities," §§ 486 et seq., post; "Fixtures," §§ 185 et seq., ante.

Colorado. Where the lessee erected a building, and a lien was filed against the leasehold interest, and the lessee sold his interest to the lessor: held, that no equitable consideration exists to hold that an absolute merger did not take place, and that the entire estate was subject to the lien: Evans v. Young, 10 Colo. 316, 15 Pac. Rep. 424, 3 Am. St. Rep. 583.

As to forfeiture of lease, see Id. 325.

As to the text, see Cary H. Co. v. McCarty, 10 Colo. App. 200, 50 Pac. Rep. 744.

Montana. Where the improvement can be removed, it does not seem to be affected by forfeiture of lease: Montana L. & Mfg. Co. v. Obelisk M. & C. Co., 15 Mont. 20, 24, 37 Pac. Rep. 897; Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

Nothing capable of removal from premises. But where nothing is constructed upon the leased premises capable of being removed therefrom, the rule is otherwise: Montana L. & Mfg. Co. v. Obelisk M.

Secret agreements in lease. The character of an improvement controls when the rights of a lien claimant are involved, and where an improvement is made in such manner as to affix it to the realty, and a laborer has no information that it will be regarded otherwise than as suggested by the manner of construction, he may well assume that he is making an improvement upon real property, and that a right of lien may attach, which will not be defeated by any secret agreement between the owner and a lessee, that the improvement may thereafter be demolished by the lessee at the expiration of the lease, or at any other time.[19]

§ 468. **Same. Homestead bound.**[20] The statute provides: "The homestead is subject to execution or forced sale in satisfaction of judgments obtained: . . . on debts secured by mechanics, contractors, subcontractors, artisans, architects, builders, laborers of every class, material-men's or vendors' liens upon the premises."[21] As the law at present

& C. Co., 15 Mont. 20, 24, 37 Pac. Rep. 897; Pelton v. Minah Consol. M. Co., 11 Mont. 281, 28 Pac. Rep. 310; Block v. Murray, 12 Mont. 545, 31 Pac. Rep. 550.

Utah. Same doctrine as Gaskill v. Trainer, 3 Cal. 335, which is cited; Ellis v. Breisacher, 8 Utah 108, 29 Pac. Rep. 879.

Washington. Bell v. Groves, 20 Wash. 602, 56 Pac. Rep. 401; Stetson & Post M. Co. v. Pacific A. Co., 37 Wash. 335, 79 Pac. Rep. 935; Northwest B. Co. v. Tacoma S. Co., 36 Wash. 333, 78 Pac. Rep. 996 (the lease being a matter of record).

As to merger discussed above, see Masow v. Fife, 10 Wash. 528, 39 Pac. Rep. 140.

See §§ 469 et seq., post, and notes.

[19] Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

[20] **Mechanics' liens on homestead property:** See note 9 L. R. A. 805; and see **Kerr's Stats. and Amdts. 1906-07,** note p. 480; **Kerr's Cyc. Code Civ. Proc.,** § 1185, note.

As to homesteads, see note 61 Am. Dec. 688-699.

[21] **Kerr's Cyc. Civ. Code,** § 1241, as amended in 1887 (Stats. and Amdts. 1887, p. 81).

Before this amendment, which included material-men, it was held that material-men could not obtain a lien upon the property after it had been impressed with a homestead: Richards v. Shear, 70 Cal. 187, 189, 11 Pac. Rep. 607. And likewise before the amendment, when the declaration of homestead was filed after the materials had been furnished, but before the filing of the claim of lien: Walsh v. McMenomy, 74 Cal. 356, 360, 16 Pac. Rep. 17. See Bonner v. Minnier, 13 Mont. 269, 34 Pac. Rep. 30, 40 Am. St. Rep. 441 (where, under similar circumstances, the opposite rule was established, and these cases were declared distinguishable, De Witt, J., dissenting). See also Merrigan v. English, 9 Mont. 113, 22 Pac. Rep. 454, 5 L. R. A. 837.

exists, a mechanic's lien may be created upon the homestead property without the joint action of the husband and

Rule is otherwise since the amendment of 1887, as shown: Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 649, 22 Pac. Rep. 860. And the homestead was subjected to such sale for materials furnished before the passage of the act when the claim was filed after its passage: Id.

See also §§ 35, 38, ante.

It seems that under the first subdivision of **Kerr's Cyc. Civ. Code,** § 1241, if the judgment foreclosing such lien has been obtained before the declaration of homestead was filed for record, the homestead will be subject to such sale.

Hawaii. Homestead exemption does not apply to liens of mechanics and material-men for labor performed or materials furnished in the erection of the building: Rev. Laws Hawaii 1905, § 1830. See Id., § 296.

Oklahoma. There must be a contract in writing with both husband and wife, if they are both living, not divorced, in order to secure a mechanic's lien on the homestead by reason of having furnished materials for improvements thereon: Rowley v. Varnum, 15 Okl. 612, 84 Pac. Rep. 487 (under Wilson's Rev. and Ann. Stats. 1903, § 2988).

Honesty and fair dealing dictates that, as between the owner of a building and the person furnishing materials therefor, such materials should be paid for before the building constructed of that material shall be held exempt from such debts, and the mere intention of the owner to make the property a homestead should not be used to the prejudice of a party who relied upon the fact that he was the owner, and gave him credit for such material upon the theory that there was no homestead: Ball v. Houston, 11 Okl. 233, 66 Pac. Rep. 358, 360.

Utah. The legislature may provide remedies for the protection of the homestead rights created and secured by the constitution, and may regulate the claim of the right, so that its exact limits may be known, and may complete the same by supplemental legislation; but it cannot attempt to narrow, defeat, or limit the homestead right thus defined by the constitution by subjecting the homesead to any kind of sale on execution, among other things. But if the homestead claimant voluntarily encumbers it as provided by the statute (Rev. Stats. 1898, § 1155), a material-man furnishing materials for an improvement of the homestead acquires a lien under the statute, which does not arise out of or under any contract, made by the owner, which can be construed into a contract for a lien; and a sale thereof under foreclosure of the lien under Rev. Stats. 1889, § 1156, is in violation of art. xxii, § 1, of the constitution: Volker-Scowcroft L. Co. v. Vance (Utah), 88 Pac. Rep. 896.

Washington. Under Gen. Stats., § 1404, and Code Civ. Proc., §§ 481-483, a lien could be claimed for the erection of a dwelling-house, although the premises are at the time intended to be used as a homestead, it being the separate property of the husband: Parsons v. Pearson, 9 Wash. 48, 36 Pac. Rep. 974.

As to separate property of the wife, or community property, see same case. Under Code of 1881, § 2410, giving the husband management of community property, he was empowered to contract for the erection of buildings on the community property and subject it to mechanics' liens; but there could be no sale of the husband's or wife's interest in the community property separately during the existence of the community, and Code of 1881, § 1959, authorizing the

wife.[22] And where a right to a mechanic's lien exists upon the property, the filing of a declaration of homestead thereon subsequently will not defeat it.[23]

interest of a party owning less than a fee-simple to be sold, did not apply to such a case: Littell & S. Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. Rep. 1035.

Homestead: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 716, 68 Id. 389; Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

[22] Palmer v. Lavigne, 104 Cal. 30, 34, 37 Pac. Rep. 775, **distinguishing** Walsh v. McMenomy, 74 Cal. 356, 16 Pac. Rep. 17.

[23] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 649, 22 Pac. Rep. 860.

See "Retroactive Laws," § 36, ante, and "Priorities," §§ 486 et seq., post.

CHAPTER XXIV.

LIMITATIONS ON LIENS (CONTINUED). ESTATES AND INTERESTS SUBJECT TO LIENS.

II. By Estoppel. Notice of Non-responsibility.

§ 469. Estates or interests bound by estoppel. Scope of discussion.
§ 470. Same. The general principles of estoppel in pais.
§ 471. Same. Independently of statute.
§ 472. Same. General rule as to when notice of non-responsibility must be given.
§ 473. Same. Notice of non-responsibility. Statutory provision.
§ 474. Same. Purpose of provision as to notice of non-responsibility.
§ 475. Same. Notice or knowledge of improvement.
§ 476. Same. Notice to corporation as owner.
§ 477. Same. Lessee in possession and making improvements.
§ 478. Same. Vendee being in possession.
§ 479. Same. When notice not required.
§ 480. Same. When notice not required in case of mines and mining claims.
§ 481. Same. Notice not required in case of grading and other work in incorporated cities.
§ 482. Same. Notice not required in case of prior liens.
§ 483. Same. Effect of knowledge of claimant of lack of authority of person making improvement.
§ 484. Same. Notice, when to be posted.
§ 485. Same. Notice, how posted. Conspicuous place.

II. BY ESTOPPEL. NOTICE OF NON-RESPONSIBILITY.

§ 469. Estates or interests bound by estoppel. Scope of discussion. In the preceding chapter, the general scope of the inquiry here was pointed out.[1] It is now necessary to inquire under what circumstances an estate or interest in property sought to be charged with a lien is subject to the same, when no contractual relation exists between the owner of such estate or interest and the claimant, either by contract with such owner directly, or through his agent,[2] actual or

[1] See § 459, ante.

[2] **The subject of agency** will be considered in another place, although that of ostensible agency bears closely upon the questions here considered. See chapter on "Agency," §§ 572 et seq., post; and "Constitutional Aspects," §§ 28 et seq., ante.

ostensible. In the sections immediately preceding, the general nature of the interests and estates subject to the lien by contract, without the intervention of any other than an agent, actual or ostensible, is considered. The following sections have reference more particularly to questions of estoppel.[3]

The general purpose of the mechanic's-lien law is to give to contractors, laborers, and material-men a lien on the land improved, as security for their labor and material. But the law also gives to the owner certain rights and privileges, by which he may protect himself against the operation of such a lien. The law does not, and in fairness should not, make the land subject to the lien in any and every case of a building or other structure erected upon it.[4]

§ 470. **Same. The general principles of estoppel in pais** will not be dwelt upon. It is familiar doctrine that the owner of land who stands by and sees another sell it, without making known his claim, is forever estopped from setting up his title against an innocent purchaser, who, believing the seller to be the owner, has parted with value; and so one who knowingly and silently permits another to spend money upon land, under the mistaken impression that he has title, will not be permitted to set up his right, at least not so far as to deprive him of the value of such improvements.[5]

§ 471. **Same. Independently of statute,** the interest of a person not contracting, either directly or through an agent, would not be subject to the liens for labor done or materials furnished, even if such person has knowledge that the same is being performed or furnished.[6]

[3] See also "Priorities," §§ 486 et seq., post.

[4] Birch v. Magic T. Co., 139 Cal. 496, 500, 73 Pac. Rep. 238.

[5] Godeffroy v. Caldwell, 2 Cal. 489, 492, 56 Am. Dec. 360. In this case there was an actual promise on the part of the mortgagee that the claimant, whose lien was not allowed, should be protected as against his mortgage for moneys advanced for the improvements.

As to fixtures becoming property of owner of realty, see §§ 185 et seq., ante.

Washington. Bell v. Groves, 20 Wash. 602, 56 Pac. Rep. 401.

[6] **Colorado.** Mellor v. Valentine, 3 Colo. 260 (part-owner). See Tritch v. Norton, 10 Colo. 337, 15 Pac. Rep. 680 (1881); Folsom v. Cragen, 11 Colo. 205, 316, 17 Pac. Rep. 515 (Gen. Stats. 1883, requiring contract to be made with owner).

Notwithstanding the fact that the owner's notice of non-responsibility under section eleven hundred and ninety-two is limited to cases arising under section eleven hundred and eighty-three, and is not applicable to those under section eleven hundred and ninety-one, relating to street-work, still, the fact that, for instance, the true owner, the wife, had notice that certain work under the last-mentioned section was going on under a contract made by her husband, and made no objection to it, would bear upon the question of agency and equitable estoppel.[7]

§ 472. Same. General rule as to when notice of non-responsibility must be given. The general rule as to the requirement of notice of non-responsibility may be stated to be, that such notice need be given in the manner re-

Co-tenant cannot impose lien upon the interest of his co-tenants without their consent: Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458. See Empire L. & C. Co. v. Engley, 18 Colo. 388, 33 Pac. Rep. 153; Johnston v. Bennett, 6 Colo. App. 362, 40 Pac. Rep. 847.

Idaho. Steel v. Argentine M. Co., 4 Idaho 505, 42 Pac. Rep. 585, 95 Am. St. Rep. 144 (interest of vendor).

Nevada. See Hampton v. Truckee C. Co., 19 Fed. Rep. 1, 4, 9 Sawy. 381.

Oklahoma. Darlington-Miller L. Co. v. Lobsitz, 4 Okl. 355, 46 Pac. Rep. 481.

Utah. Morrow v. Merritt, 16 Utah 412, 52 Pac. Rep. 667; Ellis v. Brisacher, 8 Utah 108, 29 Pac. Rep. 879. So, lessor of mine: Rev. Stats., § 1382.

The doctrine of Carey-Lombard Lumber Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572 (1890), probably does not oppose that stated in the text, although the language of the decision upon this point is not very clear.

Washington. Miles Co. v. Gordon, 8 Wash. 442, 36 Pac. Rep. 265; Nelson v. Clerf, 4 Wash. 405, 30 Pac. Rep. 716. See also St. Paul & T. L. Co. v. Bolton, 5 Wash. 763, 32 Pac. Rep. 787.

Rule of the text holds, even where the person fraudulently represents himself as the lessee, the owner not being a party to the misrepresentation: Masow v. Fife, 10 Wash. 528, 39 Pac. Rep. 140.

Wife's property bound by husband's act when. Notwithstanding the authority of the husband to contract for the erection of a building upon the separate property of the wife may not be shown, yet she will be estopped to dispute the validity of a mechanic's lien thereon, when it appears that she had full knowledge of the erection of the building, was in and around it during the course of its construction, and assisted in the selection of the colors of the paints for it: Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789.

As to mechanic's lien on wife's real estate for house erected by husband, see note 61 Am. Dec. 688 et seq.

[7] Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 118, 65 Pac. Rep. 329.

quired by the statute only in the case of the particular character of labor,[8] and upon the objects[9] enumerated, by the persons designated in the statute.

§ 473. Same. Notice of non-responsibility. Statutory provision. Partially to remove the limitations in the law[10] pointed out in the preceding sections, the statute[11] provides: "[A] Every building or other improvement mentioned in section one thousand one hundred and eighty-three of this code, constructed upon any lands with the knowledge [1] of the owner, or [2] the person having or claiming any interest therein, and [B] the work or labor of every character whatsoever done and materials furnished, mentioned in said section, upon, in or to any mining claim or claims, or real prop-

[8] See §§ 130 et seq., ante.

[9] See §§ 166 et seq., ante.

[10] **Kerr's Cyc. Code Civ. Proc.,** p. 481, § 1192, as amended Stats. 1907, Stats. and Amdts. 1907, p. 577; **Kerr's Stats. and Amdts. 1906-07,** p. 481.

[11] **Notice of non-responsibility:** See Buell v. Brown, 131 Cal. 158, 162, 63 Pac. Rep. 167.

Colorado. Notice of non-responsibility: See Gutshall v. Kornaley (Colo.), 88 Pac. Rep. 158.

New Mexico. The owner knowing of repairs, and failing to file notice of non-responsibility under Comp. Laws 1897, § 2226: See Pearce v. Albright, 12 N. M. 202, 76 Pac. Rep. 286. See Post v. Miles, 7 N. M. 317, 333, 34 Pac. Rep. 586 (dissenting opinion).

Washington. 1 Hill's Code, § 1671 (providing for notice of non-responsibility), was repealed by the act of 1893, ch. xxiv: Stetson-Post M. Co. v. Brown, 21 Wash. 619, 627, 59 Pac. Rep. 507, 75 Am. St. Rep. 862.

Construction of statutory provision. "It is contended that the owner designated in such section [1 Hill's Ann. Code, § 1671] is the owner of the legal title. Such an implication would doubtless fairly attach if § 1671 were construed only with reference to § 1663, which provides who shall be entitled to a lien; but, construing it with reference to § 1665, . . . it becomes apparent that the owners spoken of in § 1671 are the same persons referred to in § 1665. In other words, § 1671 does not give a lien on any interest that was not given by § 1665, but simply provides a way by which persons owning interests described in that section can avoid the attachment of the lien where they have not themselves contracted for the construction, alteration, or repair of the works mentioned in § 1693": St. Paul & T. L. Co. v. Bolton, 5 Wash. 763, 765, 32 Pac. Rep. 787.

Same. Of California statute. This construction is different from that given to the California provision as it stood before the amendment of 1907; but as it does not appear from the decision in the Washington case, that the owners, who gave a bond to convey the title, had any knowledge of the construction of the building by the obligee of the bond, it is possible that the case is not really contrary to the California rule, notwithstanding the difference in the construction of the statute given by the court.

erty worked as a mine, with the knowledge [1] of the owner, or [2] the person having or claiming any interest therein, shall be held to have been constructed, performed or furnished at the instance of [a] such owner or [b] person having or claiming any interest therein, [C] and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming any interest therein shall, [1] within ten days after he shall obtain knowledge of the construction, alteration, repair, or work or labor, [2] give notice that he will not be responsible for the same, by [3] posting a notice in writing to that effect, [4] in some conspicuous place [a] upon the said land or mining claim or claims, or [b] upon the building or other improvements situated thereon, or [5] file and record a copy of such notice in the office of the county recorder of the county wherein such mining claim or real property worked as a mine is situate. [D] And all mining machinery placed upon or in any mining claim or claims, or real property used as a mine, under a lease or other agreement by the terms of which [1] such machinery shall not lose its identity as the personal property of the lessor, and [2] which is used in the operation and working of such mining claim or claims, or real property used as a mine, shall be deemed to be a fixture attached to such mining claim or claims, or real property used as a mine, for the purposes only of the lien hereinbefore mentioned, and shall be subject to such lien, unless such lessor shall [a] within ten days after such machinery shall have been delivered at such mining claim or claims, or real property used as a mine, file and record such lease or other agreement in the office of the county recorder of the county in which such machinery shall be used as aforesaid; or [b] within said ten days shall post a notice in some conspicuous place in some building on said mining claim wherein said machinery is to be used, stating therein [i] that said machinery is the property of said lessor and [ii] has been leased or contracted to be sold to the person operating said mine, and [iii] that said machinery will not be liable for any lien provided for in this chapter. [E] Any person performing labor on such

mining claim or real property worked as a mine [1] may post and keep posted in a conspicuous place thereon a notice containing the substance of either or both of the notices above provided and [2] it shall be a misdemeanor for any person to take down, remove or deface such notice."

§ 474. Same. Purpose of provision as to notice of non-responsibility. The purpose of the statute, before the amendment of 1903,[12] was to allow a lien for mining-work done upon a mine, against the estate or interest therein of the person who was to benefited thereby, whether done directly for him and at his request, or indirectly for his benefit, at the request of some other person operating in pursuance of some express or implied contract with him.[13]

The original California provision as to notice of non-responsibility was clumsily worded, and the decisions construing the provision as it stood before the amendment of 1907, quoted in a preceding section, did not leave it free from doubts. It provided a mode of binding the owner's interest where the claimant is not in privity with the " owner " or person having an interest, — that is, one having a legal estate less than the fee, or such an equity as might be enforced by securing a transfer of a legal estate. The rights of mortgagees and encumbrancers, with reference to those to whom the provisions of the code concede a lien, are fixed by section eleven hundred and eighty-six.[14]

[12] Stats. and Amdts. 1903, ch. lxxvi, p. 84.

[13] Higgins v. Carlotta G. M. Co., 148 Cal. 700, 702, 84 Pac. Rep. 758, 113 Am. St. Rep. 344.

See chapter on " Agency," §§ 572 et seq., post.

[14] Williams v. Santa Clara M. Assoc., 66 Cal. 193, 200, 5 Pac. Rep. 85, 4 West Coast Rep. 616.

See " Priorities," §§ 486 et seq., post.

Oregon. This section, "assuming that a lien cannot be created without the consent of the owner, express or implied, simply provides a rule of evidence by which such consent could be determined," and such provision is not unconstitutional; but if it were provided by the statute that the fact that a person performing labor or furnishing material was not enjoined by the owner, or notified in writing not to do so, should be conclusive evidence that such labor was performed or material furnished, with or by his consent, without reference to his knowledge thereof, it would be unconstitutional: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

See " Agency," §§ 572 et seq., post. See Allen v. Rowe, 19 Oreg. 188, 23 Pac. Rep. 901; Cross v. Tscharnig, 27 Oreg. 49, 39 Pac. Rep. 540.

§ 475. Same. Notice or knowledge of improvement. Under the provision requiring the owner to post notice of nonresponsibility, the fee or interest of the "owner" is subject to the lien, if the owner, having notice or knowledge of the construction, alteration, or repair, fails to give the required notice that he will not be responsible when the work or material is contracted for by some other person.[15] But the interest of the owner is not subject when he has no such notice or knowledge.[16] It is subject, however, if he has

[15] Marchant v. Hayes, 120 Cal. 137, 139, 52 Pac. Rep. 154; Evans v. Judson, 120 Cal. 282, 283, 52 Pac. Rep. 585; Hamilton v. Delhi M. Co., 118 Cal. 148, 152, 50 Pac. Rep. 378; West Coast L. Co. v. Newkirk, 80 Cal. 275, 279, 22 Pac. Rep. 231; West Coast L. Co. v. Apfield, 86 Cal. 335, 340, 24 Pac. Rep. 993 (lessor); Harlan v. Stufflebeem, 87 Cal. 508, 513, 25 Pac. Rep. 686 (lessor); Avery v. Clark, 87 Cal. 619, 627, 25 Pac. Rep. 272, 22 Am. St. Rep. 919 (vendor's interest). See Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 379, 51 Pac. Rep. 515; s. c. 48 Pac. Rep. 69 (building erected by lessee by permission of owner); Jewell v. McKay, 82 Cal. 144, 145, 23 Pac. Rep. 139; Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 339 (1868; lessor).

Compare: Stowell v. Waddingham, 100 Cal. 7, 34 Pac. Rep. 436.

As to actual notice, see **Kerr's Cyc. Civ. Code,** § 18, and note pars. 1-8.

As to constructive notice, see **Kerr's Cyc. Civ. Code,** § 19, and note pars 1-104.

Colorado. See Seely v. Neill (Colo.), 86 Pac. Rep. 334.

Nevada. Rosina v. Trowbridge, 20 Nev. 105, 108, 17 Pac. Rep. 751; Gould v. Wise, 18 Nev. 253, 258, 3 Pac. Rep. 30.

Interest of cestui que trust. The interest of a certain cestui que trust is also bound: See Rosina v. Trowbridge, supra.

New Mexico. Ford v. Springer L. Assoc., 8 N. M. 37, 58, 41 Pac. Rep. 541; Post v. Miles, 7 N. M. 317, 325, 34 Pac. Rep. 586; Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284, 285.

Oregon. Hunter v. Cordon, 32 Oreg. 443, 52 Pac. Rep. 182.

The "owner" referred to in this section is not necessarily "the person who caused the building to be constructed," but may be the owner of the legal title: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

Washington. But, under Gen. Stats., § 1671, it was held that where the owner did not have "anything to do with the construction of said building in any way," further than guaranteeing the payment of a certain bill for lumber, which was purchased by his vendee of the land, and used in the construction of the building, although the owner did not post any notice, yet his interest was not bound, on any principle of estoppel: Iliff v. Forssell, 7 Wash. 225, 34 Pac. Rep. 928.

Compare: Spokane Mfg. L. Co. v. McChesney, 1 Wash. 609, 614, 21 Pac. Rep. 198.

[16] Lothian v. Wood, 55 Cal. 159, 163 (lessor).

Colorado. See Seely v. Neill (Colo.), 86 Pac. Rep. 334 (under Laws 1899, ch. cxviii, § 5, p. 267).

Oregon. Allen v. Rowe, 19 Oreg. 188, 23 Pac. Rep. 901.

Washington. See Mentzer v. Peters, 6 Wash. 540, 33 Pac. Rep. 1078; and under a similar provision (Code 1881, § 1965), it had to appear affirmatively that the owner had such notice: Cutter v. Striegel, 4 Wash. 346, 30 Pac. Rep. 326.

sufficient knowledge to put him upon inquiry. Thus where the owner gave leave to a tenant to construct, but the owner had no actual knowledge of the construction.[17]

§ 476. **Same. Notice to corporation as owner.** But if the property was owned by a corporation, and its president personally visited the same while the repairs were going forward, and was then informed thereof, it is prima facie sufficient to charge the corporation with knowledge of the fact that the work was being done.[18] On the other hand, if the work was done solely upon the individual responsibility of one of the directors of a mining corporation, and wholly apart from any official relation of such director to the company, and not for it in any way, the doctrine of constructive or implied notice on the part of the corporation of what was being done cannot obtain, and no lien attaches therefor on such property.[19]

§ 477. **Same. Lessee in possession and making improvements.** Where there is a lease for a brief term, under the terms of which the lessee may make and remove improvements made by him on the premises, unless the same should be so incorporated with existing structures that removal would leave the latter in worse condition than at the date of the lease, in which case the added improvements are to become the property of the lessor, the latter participates contingently in the benefit of such improvements which may be

[17] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 Pac. Rep. 515. See Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401, 402.

See § 483, post.

Nevada. Gould v. Wise, 18 Nev. 253, 3 Pac. Rep. 30 (it appeared that the agent of the corporation, also, had notice).

[18] Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 338, under act of March 30, 1868, § 4 of which required notice of non-responsibility to be posted.

See "Evidence," §§ 779 et seq., post.

Nevada. Gould v. Wise, 18 Nev. 253, 3 Pac. Rep. 30.

[19] Ayers v. Green Gold M. Co., 116 Cal. 333, 336, 48 Pac. Rep. 221, the court saying, "It may be true that the corporation would be chargeable with the knowledge of Mrs. Crittenden (the contractor), had she been either actually or ostensibly representing or acting for it in the transaction; but both the evidence and the findings show that she was not. . . . Mrs. Crittenden expressly stated to plaintiff that she was acting solely on her individual responsibility, and not for the corporation in any way."

of a permanent character, and has notice of circumstances sufficient to put a prudent man upon inquiry as to the actual improvement, and is charged with knowledge thereof, and such knowledge is not too vague to charge the lessor with the duty of giving notice of non-responsibility.[20] And the

[20] Evans v. Judson, 120 Cal. 282, 284, 52 Pac. Rep. 585.

Necessity of posting notice. The question whether it was necessary for the owner to post notices within three days after knowledge of the intention of the tenant to improve the premises at some indefinite future time was referred to, but not decided: See Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401, 402. In the case last cited the owner contracted to sell, and authorized the purchasers "to enter into immediate possession," "and proceed to work and develop the same," etc., the owners to receive twenty-five per cent.

See notes to sections immediately preceding.

As to constructive notice, see **Kerr's Cyc. Civ. Code,** § 19, note pars. 1-104.

Agreement with a lessee or conditional purchaser that improvements must be made at his own cost, and that the lessor or seller will not be liable for labor or materials, will not satisfy the statute, nor protect the interest of the owner from liens; and if he had notice of the improvement, either from the agreement itself or otherwise, his interest will be bound, in the absence of posting of notice of non-responsibility required by the statute: Ah Louis v. Harwood, 140 Cal. 500, 506, 74 Pac. Rep. 41 (the effect of verbal notice of the terms of the option by the claimant was eliminated from the case).

In Higgins v. Carlotta Gold Mining Co., 148 Cal. 700, 702, 705, 84 Pac. Rep. 758, 113 Am. St. Rep. 344, the court said, after referring to a previous portion of § 1183 of the Code of Civil Procedure: "Then follows a provision which, as it stood when these liens were filed, was as follows: 'And every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this chapter.' By an amendment made afterwards, there was inserted, immediately after the words 'any mining,' the phrase, 'either in the development thereof or in working therein by the subtractive process': Stats. 1903, ch. lxxvi, p. 84. We do not perceive how this changes the effect of the clause as it stood before, but the question is not involved, for this case must be decided upon the law existing at the time the work was done and the liens filed. This clause, as a whole, refers to both classes of liens. The phrase 'any mining' refers solely to the working of a mine, and its effect is that the person in charge of any 'mining' is made the agent of the owner, although the work he is prosecuting does not in the least improve the property or add anything thereto, but destroys or lessens its inherent value, by removing the ore therefrom: Williams v. Hawley, 144 Cal. 97, 103, 77 Pac. Rep. 762. In order to make him the agent of the owner in such a case, however, such person must be in charge with the consent of the owner, and must be prosecuting or controlling the mining operations, either wholly or in part, for the benefit of the owner: Jurgenson v. Diller, 114 Cal. 491, 46 Pac. Rep. 610, 55 Am. St. Rep. 83; Reese v. Bald Mountain Consol. G. M. Co., 133 Cal. 285, 65 Pac. Rep. 578. Such benefit may be direct, as where the ore extracted, or some share of it,

fact that the improvements are to be removed by the tenant at the termination of the lease, and are not to remain as a

remains the property of the owner, or it may be indirect, as where the ore, when extracted, is the property of the person in charge, but is to be sold by him, and a part or share of the proceeds is to be paid to the owner, or for his use or benefit. The legal effect would be the same in either case. The purpose of the statute, obviously, is to allow a lien for mining-work done upon a mine against the estate, or interest therein, of the person who is to be benefited thereby, whether done directly for him and at his request, or indirectly for his benefit at the request of some other person operating in pursuance of some express or implied contract with him. Such a case we have here. The lease is a contract; by its covenants the lessees undertook to do the mining-work, and both the lessees and the lessor were to share in the proceeds and benefits of the work. It might almost be said that such person would in such a case be authorized to bind the estate of the owner for a lien for such work without the aid of the special statutory provision making him constructively the agent of the owner for that purpose, but with the aid of the provision there can be no doubt of the proposition. There is nothing in either Jurgenson v. Diiier, 114 Cal. 491, 46 Pac. Rep. 610, 55 Am. St. Rep. 83, or Reese v. Bald Mountain Consol. G. M. Co., 133 Cal. 285, 65 Pac. Rep. 578, that is contrary to this conclusion. In the first case the person who caused the ore to be extracted had no authority from the owner to do so, and was doing it for his own exclusive benefit. Although he was occupying the premises with the consent of the owner, he was, as to the mining-work, a mere trespasser. In the latter case the decision was put upon the ground that there was no finding that the person who caused the work to be done was the 'agent of the owner,' nor anything from which such fact would be necessarily implied, nor anything to show that the owner was to receive, or had received, any benefit from or on account of the work done or the ore extracted. All of these facts appear in the case at bar. Section 1192 of the Code of Civil Procedure has no application to mining-work which consists of removing ore solely by the 'subtractive process,' as it is termed in Jurgenson v. Diiier. That section, by its express terms, applies only to 'every building or other improvement mentioned in § 1183 of this code, constructed upon any lands,' and hence does not include or apply to 'mining'-work, which does not constitute, for any purpose, an improvement to the mine or to the land: Reese v. Bald Mountain Consol. G. M. Co., 133 Cal. 285, 288, 65 Pac. Rep. 578; Williams v. Santa Clara M. Assoc., 66 Cal. 193, 200, 5 Pac. Rep. 85; Jurgenson v. Diiier, 114 Cal. 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83. With respect to the liens wholly or in part for work done for the 'purpose of opening up new ore-bodies and discovering better ore,' if such work consisted in making an 'improvement' to the mine apart from or in addition to its effect in obtaining ore from the rock excavated, it would come within the provisions of § 1192 of the Code of Civil Procedure. As the lease expressly provides that such work should be done by the lessees when they deemed it expedient, the lessor must be presumed to have had notice or knowledge of it from the beginning. Such work would also be for the lessor's benefit, either by reason of the increased receipts of net profits during the lease, or from the increased facility for the extraction of ore from the mine after the lease expired. It is conceded that the appellant posted no notice disclaiming any liability for such work or improvement, and consequently its estate in the property stands charged with a lien for the value thereof: Hines v. Miller, 122 Cal. 517, 522, 55 Pac. Rep. 401."

part of the permanent improvements of the land, does not free the owner from the necessity of giving such notice.[21]

§ 478. **Same. Vendee being in possession.** Where the statute required notice of non-responsibility in order that the owner might free his interest from liability, and the person contracting with the claimant entered into possession of land and began to develop water by means of a tunnel, under an option of purchase, which provided that neither the premises nor its owner should be held liable for labor performed in the effort to develop water, the owner's interest is subject to liens filed upon the premises for labor done after the expiration of the option, although it provided that the contractor, who subsequently became the purchaser, before the liens were filed, during the progress of the work was to furnish at his own cost all material and labor, unless the owner gave the statutory notice, or some notice equivalent thereto.[22]

In mines and mining claims, where the contract of sale of a mine authorized the vendees to work and develop the same, a certain percentage of the gross product to be applied to the purchase price, the owners have notice of an improvement, which consisted of the sinking of a shaft, and their interest is subject to liens of the vendees' laborers.[23] But where a miner had knowledge of a contract under which his employer had the right to take possession, develop and improve the mine, at his own cost and expense, and keep the property free from all liens, he has no lien on the same, if he has knowledge that the employer did not assume to act on the owner's behalf.[24]

[21] West Coast L. Co. v. Apfield, 86 Cal. 335, 340, 24 Pac. Rep. 993. See "Fixtures," §§ 185 et seq., ante.

An agreement with a lessee or conditional purchaser that improvements must be at his cost, and that the lessors or seller will not be liable for liens, will not, alone, satisfy or protect the land from liens: Ah Louis v. Harwood, 140 Cal. 500, 506, 74 Pac. Rep. 41.

[22] Ah Louis v. Harwood, 140 Cal. 500, 506, 74 Pac. Rep. 41.

Colorado. If the owner of an undivided interest in the premises permitted his vendee to take possession and improve the same, and the former posted no notice of non-responsibility, the interest of such owner was bound for liens: Seely v. Neill (Colo.), 86 Pac. Rep. 334 (under Laws 1899, ch. cxviii, § 5, p. 2267).

[23] Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401. See Birch v. Magic T. Co., 139 Cal. 496, 500, 73 Pac. Rep. 238; Ah Louis v. Harwood, 140 Cal. 500, 506, 74 Pac. Rep. 41.

[24] Reese v. Bald Mt. Cons. G. M. Co., 133 Cal. 285, 290, 65 Pac. Rep. 578.

§ 479. Same. When notice not required. Notice of nonresponsibility is not required, where not expressly provided in the statute, under the general rule heretofore stated.[25] Thus before the amendment of 1907, above quoted, the section did not apply to, nor was notice required to be given by, the owner, where the work was done on a house which was removed to a lot temporarily, and while thereon it was merely personal property.[26]

Before the amendment of 1907, set forth in a preceding section, unless the work was the construction, alteration, or repair of the objects [27] mentioned in section eleven hundred and eighty-three,[28] it seems no such notice was required to be given by the owner; for instance, where the work consisted in a subtractive process, such as "drifting in a tunnel." [29]

§ 480. Same. When notice not required in case of mines and mining claims. And from the express language of section eleven hundred and ninety-two, it seems to apply only to a "building or other improvement mentioned in section eleven hundred and eighty-three;[30] but the decisions at first seem to declare that the notice by the owner was required in the case of work "in a mining claim," especially for structures erected therein, if the owner desired to free himself from liability;[31] but the provision was held inapplicable to

[25] §§ 471, 472, ante.

[26] Fresno L. & S. Bank v. Husted (Cal., June 17, 1897), 49 Pac. Rep. 195.

[27] See "Object of Labor," §§ 166 et seq., post.

Nevada. See dissenting opinion, Gold v. Wise, 18 Nev. 253, 3 Pac. Rep. 30.

[28] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[29] Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83.

See §§ 144 et seq., ante.

But see amendment of 1903 to § 1183, Code Civ. Proc., Stats. and Amdts. 1903, p. 84.

[30] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[31] Hamilton v. Delhi M. Co., 118 Cal. 148, 152, 50 Pac. Rep. 378; Silvester v. Coe Q. M. Co., 80 Cal. 510, 513, 22 Pac. Rep. 217; Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83; Ayers v. Green G. M. Co., 116 Cal. 333, 336, 48 Pac. Rep. 221; Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401. See Phelps v. Maxwells Creek G. M. Co., 49 Cal. 336 (1868). But see also Donohoe v. Trinity Consol. G. & S. M. Co., 113 Cal. 119, 123, 45 Pac. Rep. 249, where the question of notice was not at all considered. To be in perfect symmetry with the general interpretation given to the "object" mentioned in § 1183 of the

the labor of a miner in a mine.[32] Where improvements are made in a mine by persons other than the owner, under circumstances which would constitute such persons agents of

Code of Civil Procedure (see §§ 166 et seq., ante, and §§ 130 et seq., ante), the provision seems to be applicable to "buildings and other improvements" or "structures," under the first clause of § 1183, and not to work "in mining claims," under the second clause of that section, even if the work were upon a "structure in a mining claim": See §§ 130 et seq., ante.

In this connection, in a case where a lien for work was sought to be foreclosed upon a mining claim, the court, speaking of § 1192 of the Code of Civil Procedure, said: "The language of the section last recited, which treats of buildings and improvements, and of knowledge of the construction, etc., would hardly cover a case like the one now before us": Williams v. Santa Clara M. Assoc., 66 Cal. 193, 200, 5 Pac. Rep. 85.

As to the application of provision for notice of non-responsibility under § 1192, before amendment of 1907, not being applicable to mining claims, except for structures erected thereon, see Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 65 Pac. Rep. 578.

Oregon. Under mining lien law (Laws 1891, p. 76), giving a lien for work and labor in developing a mine, except as against the owner of a mine worked by a lessee, the owner's interest is not bound, where the holder of an irrevocable, exclusive license, coupled with an interest, under which possession may be maintained against all persons, develops a mine, he being a lessee within the intent of the statute: Stinson v. Hardy, 27 Oreg. 584, 41 Pac. Rep. 116. Section 3672 of Hill's Ann. Laws refers to the work and objects mentioned in § 3669. There is no provision in the said act giving a lien on mines similar to § 3672, supra.

[32] Section 1192 of the Code of Civil Procedure, as it stood before the amendment of 1907, mentions every building or improvement constructed upon lands with the knowledge of the owner, and expressly provides for a case where notice is not given within three days after the owner shall have obtained knowledge of the construction, alteration, or repair, by posting a notice in some conspicuous place upon the land, building, or improvement. The section cannot be held applicable to a claim by a miner for labor in a mine. Labor in a mine is not a building or improvement constructed upon lands. The finding is, that appellant had full notice of the contract, and of all work being done thereunder. Even if the complaint were sufficient, the finding does not show that any building or improvement was constructed upon the lands of appellant with its knowledge. We think the views herein expressed are supported by the cases of Williams v. Santa Clara M. Assoc., 66 Cal. 200, and Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83. In the latter case it was held that labor performed in "drifting a tunnel" is not the construction, alteration, or repair of a building or other improvement, under § 1192 of the Code of Civil Procedure; that the doctrine of notice does not apply when the work consists of a subtractive process, — the removal of the very corpus of the property. It was said: "As well require one who sees a trespasser cutting his timber to post notice of his non-liability, under penalty of having his land subjected to a lien for the labor": See Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 291, 65 Pac. Rep. 578.

the owner, it has been said that the doctrine of notice has no application.[33]

Personal property on mine. A person owning personal property situated on a mine is not the "owner" of the mine, nor has he such an interest therein as would require him to post a notice of non-responsibility, to avoid mechanics' liens attaching to such personal property.[34] A person performing labor in a mining claim, for one having a contract of purchase thereof, to which the latter has annexed mining machinery leased by him, under a lease the terms of which were sufficient, as between himself and the lessor, to continue the identity of the machinery as the personal property of the lessor before the amendment of section eleven hundred and ninety-two in 1907, was not entitled to a lien upon such property;[35] for, where mining machinery, before such amendment, was placed upon a mine under a contract by which the same machinery was leased to the vendees of the mine in possession of and operating same, and by the terms of which lease the machinery retained its character as personal property, the lessor need not give notice of non-responsibility, to prevent a lien from attaching to the machinery.[36]

§ 481. Same. Notice not required in case of grading and other work in incorporated cities. It has been determined that the provision as to notice by the owner does not apply to work done under section eleven hundred and ninety-one of the Code of Civil Procedure,[37] such as the grading of lots in incorporated cities, which is not the "construction . . . of any building or other improvement," mentioned in section

[33] Hines v. Miller, 122 Cal. 517, 519, 55 Pac. Rep. 401.

New Mexico. Co-owners failing to post notice required by § 2226, Comp. Laws 1897, claimants have lien on the entire claim, where such co-owners authorize other co-owners and others to place mining machinery upon the claim and do mining thereon: Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087.

[34] Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061 (before amendment of 1907).

Lease of personal property, such as unaffixed machinery in mines, in 1896, was not provided for in the statute, and hence gave no notice: Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

[35] Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

[36] Jordan v. Myres, 126 Cal. 565, 567, 58 Pac. Rep. 1061.

[37] **Kerr's Cyc. Code Civ. Proc.,** § 1191.

eleven hundred and eighty-three of that code,[38] in accordance with the rule mentioned in preceding sections.[39]

§ 482. Same. Notice not required in case of prior liens. The provision as to notice of non-responsibility does not apply to nor affect the interest of a prior vendor's lien,[40] or a mortgagee under a recorded mortgage, for the mortgage is not such an "interest in the land" on which the building or improvement may be constructed, within the meaning of the provision; and in this connection the court has said: "It seems sufficiently plain that the section of the code refers to an estate or interest in land which may be sold and conveyed, and does not provide that a mere lien shall become 'subject' to another subsequent lien, in the sense that the later lien shall acquire precedence over the prior."[41]

Deed of trust. Nor does the rule apply to the interest of a person holding under a deed of trust as security.[42]

[38] Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 214, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174; Santa Cruz R. P. Co. v. Lyons, 133 Cal. 114, 118, 65 Pac. Rep. 329.

[39] §§ 471, 472, ante.

[40] Kuschel v. Hunter (Cal., Sept. 14, 1897), 50 Pac. Rep. 397.

[41] Williams v. Santa Clara M. Assoc., 66 Cal. 193, 201, 5 Pac. Rep. 85, 4 West Coast Rep. 616; the court also saying (p. 200), "It is very plain 'the owner or person having or claiming an interest' in the lands on which an improvement is erected, is not the person referred to in § 1186 as having a 'lien, mortgage, or encumbrance.'"

See "Priorities," §§ 486 et seq., post.

Compare: Soule v. Dawes, 14 Cal. 247, where it was held that the interest of a mortgagee was subject to a lien for extra work commenced after the mortgage was given, under a general provision in the contract for extra work, provided the work was done with the knowledge of the mortgagee and without objection from him. Same point similarly decided in Capron v. Strout, 11 Nev. 313. See Haxtun S. H. Co. v. Gordon, 2 N. D. 246, 251, 50 N. W. Rep. 708, 33 Am. St. Rep. 776, 779 (distinguishing Soule v. Dawes on the facts, but holding the lien prior to the mortgage on the facts).

As to priority of mechanic's lien over mortgage, see note 33 Am. St. Rep. 783.

Oregon. Capital L. Co. v. Ryan, 34 Oreg. 73, 54 Pac. Rep. 1093, citing Williams v. Santa Clara M. Assoc., 66 Cal. 193, 200, 5 Pac. Rep. 85, 4 West Coast Rep. 616.

[42] Williams v. Santa Clara M. Assoc., 66 Cal. 193, 200, 5 Pac. Rep. 85, 4 West Coast Rep. 616; and see Kuschel v. Hunter (Cal., Sept. 14, 1897), 50 Pac. Rep. 397 (dictum); and see Weber v. McCleverty, 149 Cal. 316, 322, 323, 86 Pac. Rep. 706; see "Priorities," §§ 486 et seq., post.

Contra: Fuquay v. Stickney, 41 Cal. 583, 586.

§ 483. Same. Effect of knowledge of claimant of lack of authority of person making improvement. Where the claimant has actual notice that the owner did not authorize the work, and that the person having charge of a mining claim does not own the property, and was not authorized, there is no lien.[43] As indicated in the note, this subject has been touched upon in a preceding section of this work.

§ 484. Same. Notice, when to be posted. Under section eleven hundred and ninety-two,[44] notice may be posted within the statutory period after construction has been actually begun by a lessee, notwithstanding the fact that the owner had knowledge of the intention to construct before the commencement thereof.[45] Whoever drafted the section above referred to may have concluded, when he had framed the expression, "knowledge of the construction," etc., that it might be understood to mean the completion of the work, and so added the expression, "or the intended construction," etc., for the purpose of greater clearness, thinking that the actual commencement of the improvement would thus be more clearly indicated. The phrase, "intended construction," is susceptible of a different meaning than if it read, "or the intention to construct," etc. However this may be, the statute should be given an interpretation that would best answer its purposes, and this can be ascertained by keeping in mind the various conditions to which the law must be applied. Contracts for the sale as well as for the leasing of land conditional on its improvement by the purchaser or lessee at some future time, are quite common. This contemplated improvement may be for a short period, or it may be for one or more years, the work not to begin for many months, or even years, in the indefinite future, and the con-

[43] Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83; and see Silvester v. Coe Q. M. Co., 80 Cal. 510, 513, 22 Pac. Rep. 217 (the employer, apparently, had no interest in the property). See § 475, ante.

[44] **Kerr's Cyc. Code Civ. Proc., § 1192.**

[45] Birch v. Magic T. Co., 139 Cal. 496, 500, 73 Pac. Rep. 238.

Question whether notice posted within three days after knowledge of the intended future construction of a building by a lessee would, in all cases, be sufficient to protect the owner, not decided in Birch v. Magic T. Co., supra.

tract or its terms may be unknown to the laborer or materialman who in this distant future is to furnish labor or material for the improvement. The owner would be charged with knowledge of the intended work as soon as he signs the contract, and, under such circumstances, it has been contended that he must within three days post his notice or lose his protection against the lien; but, on the other hand, if he post such notice, it is not at all likely that it would remain posted and be conspicuous when, in the future, the laborers and material-men would be called upon to furnish labor and material, and yet the owner would be protected. If, however, the owner posted his notice within three days after the actual construction began, the persons interested could not fail to observe it, and would govern themselves accordingly. It is a much better protection to the laborers and material-men, and equally subserves to protect the owner, to hold the notice posted by the owner "within three days after he shall have obtained knowledge of the construction" (i. e., the actual beginning of the work) to be in time, and such is the notice referred to in the statute. Whether or not a notice posted within three days after knowledge of the intended construction would in all cases be sufficient to protect the owner is a question not yet decided. A failure to give such a notice within three days after he has obtained knowledge of the actual commencement of the work does not deprive him of the protection given him by the statute.[46]

[46] **In Evans v. Judson,** 120 Cal. 282, 52 Pac. Rep. 585, the lease contemplated improvements within a short period in the future, and the owner posted no notice disclaiming responsibility. It was held that the landlord, who was to benefit by the improvements, was charged by the lease with knowledge of the actual improvement. So held, also, in Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

In Fuquay v. Stickney, 41 Cal. 583, the case arose under the act of 1867-68. The court said: "If the owner of land . . . knowingly permits buildings and improvements to be erected on it without giving notice that it is done without his consent, it is eminently just that he shall be held to have acquiesced in it." "In the cases cited, and others we have examined, no notice was given, and the point decided was, that, having authorized the improvements, the owner is charged with knowledge that they are to be made; but we find no case deciding at what particular time the notice must be given": Birch v. Magic T. Co., 139 Cal. 496, 500, 73 Pac. Rep. 238.

"**To hold that the statute compels the owner to give the notice within three days** after he has knowledge of the intended construction would, in most cases, give no effect to the provision as to notice,

§ 485. Same. Notice, how posted. Conspicuous place. The section mentioned in the preceding sections,[47] as amended in 1907, provides that the notice of non-responsibility must be posted "in some conspicuous place upon said land or mining claim or claims, or upon the building or other improvements situated thereon," otherwise it will not be sufficient, unless the claimant had actual knowledge that such a notice had been posted.[48]

where he had knowledge of the actual construction. But we cannot say that the legislature had no object in making this provision. It would be more reasonable to suppose that it was intended to provide that the owner might give the notice within three days after the actual construction was commenced": Birch v. Magic T. Co., 139 Cal. 496, 498, 500, 73 Pac. Rep. 238.

[47] See §§ 473 et seq., ante.

[48] Silvester v. Coe Q. M. Co., 80 Cal. 510, 513, 22 Pac. Rep. 217.

Recording notice of non-responsibility: See **Kerr's Cyc. Code Civ. Proc.**, § 1192, **Kerr's Stats. and Amdts. 1906-07**, p. 481.

Nevada. Personal notice was held to be insufficient, in Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751.

Oregon. Where a notice is posted in good faith by the owner, with the intent and purpose that it should remain as long as a notice would remain in a place of that nature under ordinary conditions, the presumption is that it remained a sufficient length of time to impart knowledge to the persons it is intended to affect, and the failure to show the length of time the notice remained posted is immaterial: Marshall v. Cardinell, 46 Oreg. 410, 80 Pac. Rep. 652 (under Bellinger and Cotton's Ann. Codes and Stats., § 5643).

Where notice was posted on front of building bordering on public street, and its position was such that it could readily be observed by persons entering the building, both by a stairway and upon the first floor, the conspicuousness of the place was commended: Marshall v. Cardinell, 46 Oreg. 410, 80 Pac. Rep. 652 (under Bellinger and Cotton's Ann. Codes and Stats., § 5643).

Notice posted in little recess on a partition wall several feet back from street, not easily seen, was not posted in a conspicuous place, under Hill's Ann. Laws, § 3672, and knowledge by a claimant of such posting, after furnishing materials, will not relieve the owner's property from liability: Nottingham v. McKendrick, 38 Oreg. 495, 63 Pac. Rep. 822, 59 Id. 195.

CHAPTER XXV.

LIMITATIONS ON LIENS (CONTINUED). PRIORITIES.

§ 486. Scope of chapter.
§ 487. Priorities between mechanics' liens and other estates or interests, or other classes of liens.
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§ 489. Same. General analysis of provision.
§ 490. Same. Grants and conveyances.
§ 491. Same. Doctrine of relation.
§ 492. Same. Lien for materials.
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§ 501. Same. Garnishment by creditor.
§ 502. Same. Lien on two or more buildings. Statutory provision.
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§ 504. Priorities inter sese. Statutory provision.
§ 505. Same. Nature of provision.
§ 506. Same. Effect of constitution on statutory provision.
§ 507. Same. Insufficient proceeds. Prorating.

§ 486. Scope of chapter. In the last preceding chapters the subject of the estates and interests subject to mechanics' liens has been considered absolutely, and without reference to their relative value as affected by other estates, interests, or liens.[1] In this chapter will be treated the latter subject, or the ranking of mechanics' liens with reference: 1. To other estates, interests, or other classes of liens; and 2. As between mechanics' liens themselves.

[1] See § 439, ante.

§ 487. Priorities between mechanics' liens and other estates or interests, or other classes of liens.[2] In the absence of any statutory provisions as to record or notice, liens have precedence over other estates or interests, or other classes of liens, in accordance with the maxim, Qui prior est tempore, potior est jure, — He who is prior in time is stronger in right.[3] Claimants are, under such circumstances, charged with notice as to unrecorded mortgages.[4] On the other hand,

[2] **As to priority of mechanics' liens over mortgage for advances,** see 7 Am. & Eng. Ann. Cas. 617, 624.

As to priority of mechanics' liens generally, see note 13 L. R. A. 705.

As to marshaling of liens, see Dunlop v. Kennedy (Cal., Aug. 31, 1893), 34 Pac. Rep. 92, 95 (rehearing granted).

Idaho. See dissenting opinion, Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513, 521.

Oregon. See Gaines v. Childers, 38 Oreg. 200, 63 Pac. Rep. 487.

Marshaling assets: See Smith v. Wilkins, 38 Oreg. 583, 588, 64 Pac. Rep. 760, 761.

Utah. See Cahoon v. Fortune M. & M. Co., 26 Utah 86, 72 Pac. Rep. 437. See Fields v. Daisy G. M. Co., 26 Utah 373, 73 Pac. Rep. 521, s. c. 25 Utah 76, 69 Pac. Rep. 528, 529.

Washington. Stipulation as to priorities not to affect other lien claimants: See Potvin v. Denny Hotel Co., 9 Wash. 316, 37 Pac. Rep. 320, 38 Pac. Rep. 1002. As to priority of logger's lien, see Jewett v. Darlington, 1 Wash. 601 (U. S.).

As to priority of farm-laborers' liens on crops, see Pierce's Code, § 6127, and notes.

As to lien on franchises, etc., under Laws 1897, p. 55, § 1, see Fitch v. Applegate, 24 Wash. 25, 31, 64 Pac. Rep. 147.

[3] Preston v. Sonora Lodge, 39 Cal. 116, 118 (dictum); Williams v. Santa Clara M. Assoc., 66 Cal. 193, 199, 5 Pac. Rep. 85, 4 West Coast Rep. 616 (dictum). See Cahoon v. Levy, 6 Cal. 296, 298, 65 Am. Dec. 515; Walker v. Hauss-Hijo, 1 Cal. 183, 186; Wilson v. Donaldson, 121 Cal. 8, 10, 53 Pac. Rep. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17 (crops as personal property; priority with reference to chattel mortgage).

Colorado. The right to a lien cannot impair a valid lien by deed of trust upon the land, which is recorded prior to the time when the mechanic's lien attached; but, in the absence of special circumstances, the latter may take precedence with regard to the building: Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419.

Priority of lien of mortgage on land, and subordination thereof with reference to the building: See Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419. See also 7 Am. & Eng. Ann. Cas. 617, 624.

Hawaii. Time of filing, the test of priority under the statute: Lucas v. Redward, 9 Hawn. 23, 26.

Montana. Priority between mechanic's lien and attachment lien: See A. M. Holter H. Co. v. Ontario M. Co., 24 Mont. 184, 61 Pac. Rep. 3.

[4] Rose v. Munie, 4 Cal. 173, 175. See Soule v. Dawes, 7 Cal. 576, 14 Cal. 247.

See notes, §§ 469 et seq., ante.

Record notice limited to subsequent mortgagees and purchasers: Dennis v. Burritt, 6 Cal. 670, 672, 673; Pepley v. Huggins, 15 Cal. 127,

persons dealing with the property during the progress of the work are, independently of any statutory rule, charged with notice of the claims of mechanics;[5] and when the lien has once attached, grants and encumbrances do not affect the lien.[6]

§ 488. **Same. Statutory statement of rule.** As between lien-holders under the mechanic's-lien statute and third parties, the statutory provision[7] substantially follows the general equitable maxim quoted in a preceding section;[8] as applied to the recording statute, as follows: "The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other encumbrance of which the lien-holder had no notice, and which was

132; McCabe v. Grey, 20 Cal. 509, 516. See Miller v. Stoddard, 50 Minn. 272, 276, 52 N. W. Rep. 895; Sharon v. Minnick, 6 Nev. 377, 391; Adams v. Baker, 24 Nev. 162, 169, 51 Pac. Rep. 252, 77 Am. St. Rep. 799.

Colorado. The lien has precedence over a prior mortgage upon the land upon which the improvement is erected, where the mortgage is given in the usual way, without intent that it shall cover the improvements, and the lien claimants have no notice that it does so: Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 421 (under provisions Mills's Ann. Stats., § 2884).

Utah. Sanford v. Kunkel, 85 Pac. Rep. 363, 365, 1012.

Mortgage for advances for building purposes not subject to the rule. The court say: "Where mechanics and material-men have notice of a mortgage which is given expressly for the purpose of securing funds to construct an improvement, and know that the funds thus obtained are being applied in that way, their rights must be held subordinate to those of the mortgagee, to the extent of such advances, because of this knowledge. In other words, when they know that a structure upon which they are engaged has been pledged as a security for advances towards its construction by a contract entered into before the work of erection was commenced, they are bound by such arrangement, up to the extent that funds under such contract are actually advanced and applied to construct the building": Joralmon v. McPhee, supra, **citing:** Kiene v. Hodge, 90 Iowa 212, 57 N. W. Rep. 717; Hoagland v. Lowe, 39 Neb. 397, 58 N. W. Rep. 197; Patrick Land Co. v. Leavenworth, 42 Neb. 715, 60 N. W. Rep. 954; James River L. Co. v. Danner, 3 N. D. 470, 57 N. W. Rep. 343; Anglo-American S. & L. Assoc. v. Campbell, 13 D. C. 581, 43 L. R. A. 632.

[5] Soule v. Dawes, 7 Cal. 575. 577, s. c. 14 Cal. 247, 256; Crowell v. Gilmore, 13 Cal. 54, 57.

[6] Gaskill v. Moore, 4 Cal. 233, 235.

[7] **Kerr's Cyc. Code Civ. Proc.,** § 1186.

[8] See § 487, ante.

unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished." [9]

§ 489. **Same. General analysis of provision.** The first clause of the statutory provision set forth in the last preceding section has reference to "subsequent" encumbrancers, and the second clause to "prior" encumbrancers.[10]

Valid or void original contract. Under this provision of section eleven hundred and eighty-six,[11] the cases must be divided into two categories, distinguished by the existence or non-existence of a valid original contract. In the former case, the priority of the liens is to be determined by the date of the commencement of the building; in the latter, by the time the work was done or the materials were commenced to be furnished.[12]

§ 490. **Same. Grants and conveyances.** It will be noticed that the provisions of section eleven hundred and eighty-six [13] do not expressly mention grants and conveyances of real property, but, under the general principles of priorities, which have their enunciation in the Civil Code,[14] it is thought that these liens take precedence over subsequent "grants"

[9] **Lien relates back** to the time the work was done or the material commenced to be furnished for which lien is claimed, and the lien has priority over a deed of trust executed about a year after the commencement of such work and the furnishing of such material: Farnham v. California S. D. & T. Co. (Cal. App., May 18, 1908), 96 Pac. Rep. 788.

Utah. Carey-Lombard L. Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572.

Washington. Nason v. Northwestern M. & P. Co., 17 Wash. 142, 49 Pac. Rep. 235. See Bell v. Groves, 20 Wash. 602, 56 Pac. Rep. 401.

[10] **This provision has no reference to priority as between claimants** of liens for labor or materials as between themselves, since this is provided for by **Kerr's Cyc. Code Civ. Proc.,** § 1194; treated in §§ 504 et seq., post.

[11] **Kerr's Cyc. Code Civ. Proc.,** § 1186.

[12] McClain v. Hutton, 131 Cal. 132, 135, 144, 61 Pac. Rep. 273, 63 Id. 182, 622. See Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 642, 22 Pac. Rep. 860; Avery v. Clark, 87 Cal. 619, 25 Pac. Rep. 919, 22 Am. St. Rep. 272; Pacific M. L. I. Co. v. Fisher, 106 Cal. 224, 236, 39 Pac. Rep. 758.

See § 491, post.

[13] **Kerr's Cyc. Code Civ. Proc.,** § 1186.

[14] See **Kerr's Cyc. Civ. Code,** §§ 2897 et seq., and notes.

and "conveyances," and also over prior unrecorded grants and conveyances, although the section expressly refers only to "liens, mortgages, and other encumbrances." [15]

§ 491. Same. Doctrine of relation.[16] To determine whether an encumbrance is prior or subsequent in point of time, resort is had to the doctrine of relation, and, as expressed in section eleven hundred and eighty-six,[17] the time when the "building, improvement, or structure was commenced, work done, or materials were commenced to be furnished," fixes the point of time to which these liens relate.[18]

[15] **The California statute,** notwithstanding the general statement of some of the decisions, regards the building, at least for certain purposes, as a fixture to the land, and does not provide for priority of the lien over prior mortgages, etc., so far as the improvements are concerned, as is the case in other statutes herein considered.

In Hotaling v. Cronise, 2 Cal. 60, 64, decided under the act of 1850 (§ 9), which provided that the "lien shall be preferred to every other lien or encumbrance which attached subsequent to the time at which the work was commenced or materials were furnished," it was held that the transfer of the property before the lien was filed for record did not affect the lien. See Gaskill v. Moore, 4 Cal. 233, 235; Soule v. Dawes, 7 Cal. 576, 577; McGreary v. Osborne, 9 Cal. 119, 125 (1856); and Shuffleton v. Hill, 63 Cal. 483, 6 West Coast Rep. 436. But see Montrose v. Conner, 8 Cal. 344, 347 (1855), where a subsequent purchaser had no notice.

Colorado. See Mellor v. Valentine, 3 Colo. 255 (unrecorded bond to reconvey); Tritch v. Norton, 10 Colo. 337, 15 Pac. Rep. 680 (1881); Marean v. Stanley, 5 Colo. App. 340 (taking notice of parts of day).

Montana. Under Comp. Stats. 1887, §§ 1374, 1376, the lien of a mechanic as to the improvement was superior to a prior mortgage on the land; but as to the land itself, the prior mortgage maintained precedence; and therefore where a claimant did not erect a building nor place such improvement upon a mining claim as was susceptible of removal, his lien yielded to a prior mortgage: Johnson v. Puritan M. Co., 19 Mont. 30, 47 Pac. Rep. 337. See Grand Opera House Co. v. Maguire, 14 Mont. 558, 37 Pac. Rep. 607; Montana L. & M. Co. v. Obelisk M. Co., 15 Mont. 24, 37 Pac. Rep. 897; Murray v. Swanson, 18 Mont. 533, 46 Pac. Rep. 441; Mason v. Germaine, 1 Mont. 273 (1865).

Utah. A conveyance procured in fraud of a mechanic's lien will not have the effect of precluding the foreclosure of the lien, although notice of the lien be filed subsequent to the purchase, but within the statutory limit; and where one purchased property to which a valid lien has attached, it is to be presumed that the price was fixed with reference to the encumbrance, or that the purchaser secured himself from liens in some other way: Ellis v. Breisacher, 8 Utah 108, 29 Pac. Rep. 879.

[16] **As to relation,** see notes 7 Am. & Eng. Ann. Cas. 624; 16 L. R. A. 335.

[17] **Kerr's Cyc. Code Civ. Proc.,** § 1186.

[18] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860 (material); Germania B. & L. Assoc. v. Wagner, 61 Cal. 349,

Lien on mine. Relation back. Work done on a mine, consisting of breaking down and tearing away from the face of

354 (materials); Barber v. Reynolds, 44 Cal. 519, 533 (1862); McCrea v. Craig, 23 Cal. 522, 525; Soule v. Dawes, 7 Cal. 576, 577; Crowell v. Gilmore, 13 Cal. 54, 57; Tuttle v. Montford, 7 Cal. 358, 360 (1855); Williams v. Mountaineer G. M. Co., 102 Cal. 134, 142, 34 Pac. Rep. 702, 36 Id. 388 (mining claim); Purser v. Cady (Cal., June 17, 1897), 49 Pac. Rep. 180 (labor).

Relation, valid or void contract: See § 489, ante.

Colorado. Keystone M. Co. v. Gallagher, 5 Colo. 23 (1872); Small v. Foley, 8 Colo. App. 435, 445, 47 Pac. Rep. 64 (1889); Tritch v. Norton, 10 Colo. 337, 15 Pac. Rep. 680 (1881).

The contractor must inform himself of prior liens; the rule of caveat emptor applies: See Cornell v. Dunbar Lumber Co., 9 Colo. App. 225, 47 Pac. Rep. 912; Schradsky v. Dunklee, 9 Colo. App. 394, 48 Pac. Rep. 666.

Failure to perfect lien also relates back: Schradsky v. Dunklee, supra. See also Orman v. Crystal River R. Co., 5 Colo. App. 493, 498, 39 Pac. Rep. 434; Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989.

Hawaii. Contra: Lucas v. Redward, 9 Hawn. 23, 25 (under Sess. Laws 1888).

Idaho. Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513 (under Sess. Laws 1899, p. 149, § 11).

Montana. Murray v. Swanson, 18 Mont. 533, 46 Pac. Rep. 441 (1887); Mason v. Germaine, 1 Mont. 263 (1879); Merrigan v. English, 9 Mont. 113, 22 Pac. Rep. 454, 5 L. R. A. 837 (lien held to relate back to commencement of work by the original contractor); Mochon v. Sullivan, 1 Mont. 472 (1865). See Davis v. Alvord, 94 U. S. 545, 547, bk. 24 L. ed. 283, **modifying** (see note 21, post, this chapter) Davis v. Bilsland, 85 U. S. (18 Wall.) 659, bk. 21 L. ed 969; Alvord v. Hendrie, 2 Mont. 115.

Nevada. See Sabin v. Connor, 21 Fed. Cas., p. 124.

Oregon. Tatum v. Cherry, 12 Oreg. 135, 6 Pac. Rep. 715 (1874); In re Coulter, 2 Sawy. C. C. 42, 6 Fed. Cas., p. 637; Kendall v. McFarland, 4 Oreg. 293.

Statute must be strictly complied with, to secure such precedence: Kendall v. McFarland, supra. See Willamette Falls Co. v. Riley, 1 Oreg. 183, 187.

The lien attaches when the materials are first placed on the premises, or when the work is begun, and remains inchoate until the claim is filed, under Hill's Ann. Stats., § 3671 (Bellinger and Cotton's Ann. Codes and Stats., § 5644), when it becomes effective, and relates back to the commencement of the structure: Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330. See Inman v. Henderson, 29 Oreg. 116, 45 Pac. Rep. 300.

Utah. Fields v. Daisy G. M. Co., 25 Utah 76, 69 Pac. Rep. 528; Morrison v. Inter-Mt. S. Co., 14 Utah 201, 46 Pac. Rep. 1104; Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238; Spargo v. Nelson, 10 Utah 274, 37 Pac. Rep. 495; Carey-Lombard L. Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572.

No lien can attach until claimant files statement of his intention to do work and furnish materials (§ 12), or begins to work or furnish materials: Morrison v. Carey-Lombard Co., supra; Garland v. Bear Lake & R. W. Irr. Co., 9 Utah 350, 34 Pac. Rep. 368; Teahen v. Nelson,

the drifts and mine the quartz and substances of the mine, entitles laborers to a mechanic's lien, under section eleven hundred and eighty-three of the Code of Civil Procedure; and upon filing the lien the right relates back to the time when the labor was performed.[19]

The distinction between the time at which the lien attaches, and the time to which it relates after it has once attached, must be drawn; for instance, no "lien" attaches to the property until the claim has been filed for record, as it is inchoate;[20] but after such filing the "lien" relates back to the time when the work was done or materials were commenced to be furnished, etc. Some confusion exists in the decisions because of a failure clearly to observe this distinction. Notwithstanding the broad language of this section, it is not probable that the lien of the owner's laborer or material-man, who begins work or furnishes material after the building has been commenced, and after a mortgage has been given upon the property, would have priority over the mortgage;[21] and the expression, "building or structure was

6 Utah 363, 23 Pac. Rep. 764. See Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781; Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1010.

Washington. Nason v. Northwestern M. & P. Co., 17 Wash. 142, 49 Pac. Rep. 235, in which it was held that the lien related back to the time of beginning the labor so as to take precedence of a lis pendens filed before filing the claim of lien (Laws 1893, p. 33, § 4: Ballinger's Ann. Codes and Stats., § 5903); Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 129, 34 Pac. Rep. 774; Keene G. S. Bank v. Lawrence, 32 Wash. 572, 73 Pac. Rep. 680. In the last case, even though the materials were contracted for before the execution of the mortgage, but were delivered afterwards, the court said that "the date of the actual furnishing of the material governs the inception of the lien."

Wyoming. See Big Horn L. Co. v. Davis, 14 Wyo. 455, 84 Pac. Rep. 900, 905, 85 Id. 1048.

[19] Chappius v. Blankman, 128 Cal. 362, 365, 60 Pac. Rep. 925.

[20] See § 19, ante.

[21] See Crowell v. Gilmore, 18 Cal. 370, 372 (1856); Barber v. Reynolds, 44 Cal. 519, 533 (1862); Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860.

See further, §§ 495 et seq., post.

Montana. Contra: Davis v. Bilsland, 85 U. S. (18 Wall.) 659, bk. 21 L. ed. 969, three justices dissenting — construing an early statute.

Washington. Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. Rep. 1073 (Gen. Stats., § 1666); Home S. & L. Assoc. v. Burton, 20 Wash. 688, 56 Pac. Rep. 940 (Hill's Ann. Codes and Stats., § 1960). "Each lien, under our statute, must stand upon its own footing."

commenced," probably has reference to the lien of the original contractor only.[22]

§ 492. Same. Lien for materials. In the case of a material-man, the material is "furnished," and the lien relates back to the time when he has such materials as he has contracted to furnish, ready for delivery at the place where he agreed to deliver them;[23] and it is not necessary to deliver the materials at the building, in order that he may be considered to have "furnished" them, within the meaning of the statute.[24] The lien for materials, thus relating back to the commencement of furnishing them, has priority over a mortgage subsequently executed.[25]

[22] See Barber v. Reynolds, 44 Cal. 519, 533 (1862).

Washington. See Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 128, 32 Pac. Rep. 1073.

[23] Tibbetts v. Moore, 23 Cal. 208, 214.

In Bennett v. Beadle, 142 Cal. 239, 243, 75 Pac. Rep. 843, it was said of Tibbetts v. Moore, supra: "Without questioning the correctness of that decision as to the particular matter there involved, it will be observed that the word 'furnished,' there construed, was used in relation to a different subject-matter from that here under discussion [lien upon a vessel], namely, the question of priority of liens, which is now embraced in § 1186 of the Code of Civil Procedure, whereby a material-man's lien is preferred to liens attaching subsequent to the time when the materials 'are commenced to be furnished.'"

Montana. McEwen v. Montana P. & P. Co., 90 Pac. Rep. 359. See Clark v. Lindsay, 19 Mont. 1, 47 Pac. Rep. 102; 61 Am. St. Rep. 479.

Washington. Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 130, 32 Pac. Rep. 1073.

[24] Tibbetts v. Moore, 23 Cal. 208, 214.

See § 88, ante.

[25] Pacific Mut. L. I. Co. v. Fisher, 106 Cal. 224, 236, 39 Pac. Rep. 758; Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 354; Schwartz v. Knight, 74 Cal. 432, 434, 16 Pac. Rep. 235 (although building left uncompleted). See Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860 (whether contract made directly with owner or his contractor); McClain v. Knight, 131 Cal. 132, 143, 61 Pac. Rep. 273, 63 Id. 623. See also Maher v. Shull, 11 Colo. App. 322, 327, 52 Pac. Rep. 1115.

See § 495, post.

Colorado. Or subsequent alienations: Mellor v. Valentine, 3 Colo. 255; Keystone M. Co. v. Gallagher, 5 Colo. 512 (1872).

Where the work done or materials furnished is continuous in its nature, the contract must be regarded as an entirety, and the lien attaches for work done and materials furnished after as well as before the purchase: Id.

As to running account. Time begins to run against mechanic's lien when: 7 Am. & Eng. Ann. Cas. 947.

Oregon. Inman v. Henderson, 29 Oreg. 116, 45 Pac. Rep. 300; Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 170, 44 Pac. Rep. 390; Kendall v. McFarland, 4 Oreg. 293.

§ 493. **Same. Contractors and subcontractors. Void contract. Homestead.** In connection with the subject of relation, Mr. Justice Works, speaking for the court, said: "In some of the earlier cases a distinction was made, in this respect, between contractors with the owner and subcontractors. As to the former, it was held that their liens attached at the commencement of the work, and as to the latter, that their liens were in the nature of attachments, and attached at the time notice was given to the owner.[26] But this distinction does not exist under the present statute, where the original contract is void. In such case the contract is, by the terms of the statute, deemed to be the contract of the owner, and the lien must be held to attach as in case of such a direct contract. Any other construction would relieve the owner from any liability, under the circumstances of this case. He could get his house completed, declare his homestead, and say to the original contractor, 'Your contract is void, and I am not personally liable to you [on the express contract], nor is my property liable to any lien in your favor'; and to the material-man he could say, 'After getting the full benefit of your material, and just before you could file your lien under the statute, I filed my declaration of homestead; and your lien comes too late.' We do not wish to be understood as agreeing to the doctrine declared in the early decision cited, that the lien of a material-man did not attach at the time of furnishing the material, even under the former statute;[27] but, conceding it to have been so under the then existing statute, it is clearly not so now, where the contract is void for any of the reasons stated in the statute."[28]

Utah. But when a person, who has a lien against property, for the purpose of inducing another person to loan money on the same property as security, releases such right, such party, after such person has so loaned the money on the faith of such security, will not be heard to reassert his right of lien as against the person who so parted with his money: Spargo v. Nelson, 10 Utah 274, 37 Pac. Rep. 495.

[26] Citing Cahoon v. Levy, 6 Cal. 295, 297, 65 Am. Dec. 515.

[27] Citing Germania Bldg. & L. Assoc. v. Wagner, 61 Cal. 349, 350.

[28] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860 (McFarland, J., dissenting).

In Barber v. Reynolds, 44 Cal. 519, 533 (1862), Wallace, C. J., delivering the opinion of the court, said: "There being no written con-

A declaration of homestead does not now defeat a right to a lien which has already attached, although the claim of lien has not yet been filed.[29]

§ 494. Same. Parts of day. In conformity with the rules stated in the sections immediately preceding, the court will take notice of the parts of a day, or the exact time when the instrument was filed for record, thus giving a lien for work commenced two hours before a mortgage was filed for record priority over the mortgage or other encumbrance.[30]

§ 495. Same. General rule. From a consideration of the statute and rules suggested in the sections immediately preceding, the general rule may be stated as follows: The

tract for the construction of the building, and the several liens of the plaintiffs arising under the seventeenth section of the act, these liens did not relate back to the commencement of the work, July 30, 1866; but each lien related to the commencement of the particular labor or the furnishing of the particular materials for which the claim was made in the account filed in the recorder's office. This is the rule of priority which we think the statute contemplated in reference to liens of the character of those with which we are now dealing. We think that the phrase, 'which lien shall relate to the time of the commencement of the work,' occurring in the seventeenth section, has reference, not to the commencement of the general construction of the building, but to the commencement of the particular work of [or] furnishing materials in virtue of which a particular person claims a lien. Upon any other construction it must follow that a lien sufficient and affording ample security at the time a particular piece of work was commenced or materials furnished might become practically lost or dissipated by the subsequent recklessness or extravagance of the proprietor of the building, involving, it might be, liens of such magnitude in aggregate amount as to leave comparatively nothing to satisfy the laborer or material-man, whose lien was perhaps the earliest in point of time." Section 17 of this act expressly provided that when a person shall proceed to construct, repair, or cause to be constructed or repaired, any building, etc., without making a contract, in writing, for such construction, etc., every person who shall perform labor, etc., shall have a lien to the full extent of all labor performed, etc., upon the interest of the person causing the same to be constructed or repaired, etc., "which lien shall relate to the time of the commencement of the work."

See § 468, ante.

[29] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 649, 22 Pac. Rep. 860.

See **Kerr's Cyc. Civ. Code,** § 1241, and note.

See also §§ 37, 468, ante.

[30] Preston v. Sonora Lodge, 39 Cal. 116, 119 (1868).

See note 61 Am. Dec. 700.

Fractions of a day considered when: See **Kerr's Cyc. Code Civ. Proc.,** § 12, note pars. 9-12.

liens of mortgages,[31] deeds of trust,[32] judgments,[33] and other encumbrances,[34] created subsequently to the time when the

[31] Ah Louis v. Harwood, 140 Cal. 500, 505, 74 Pac. Rep. 41; Hamilton v. Delhi M. Co., 118 Cal. 148, 152, 50 Pac. Rep. 378; Avery v. Clark, 87 Cal. 619, 627, 25 Pac. Rep. 919, 22 Am. St. Rep. 272; Bewick v. Muir, 83 Cal. 368, 371, 23 Pac. Rep. 389; Harmon v. Ashmead, 68 Cal. 321, 323, 9 Pac. Rep. 183; Crowell v. Gilmore, 13 Cal. 54, 56.

Where the work done or materials furnished by subclaimants under a void statutory original contract was commenced prior to the date of a mortgage upon the premises, the mortgage is subsequent to the liens: McClain v. Hutton, 131 Cal. 132, 133, 135, 144, 61 Pac. Rep. 273, 63 Id. 182, 622.

See §§ 486 et seq., ante.

Montana. And the mortgagee, by purchasing under foreclosure of his mortgage, succeeds only to the rights of the mortgager, and is not a bona fide purchaser without notice of the mechanics' liens: Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep 413, 417 (under Code Civ. Proc., § 2133).

Nevada. Capron v. Strout, 11 Nev. 313.

Oregon. A mortgage prior in time takes precedence over the lien of claimants as to the land on which the structure is erected, but it is otherwise as to the building: Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 408, 60 Pac. Rep. 1; Smith v. Wilkins, 38 Oreg. 583, 585, 64 Pac. Rep. 760.

But where, after the right to a mechanic's lien has attached, but before the claim of lien is filed, a prior mortgage is renewed, the renewed mortgage is prior to the lien, the mortgagee being ignorant of the intervening liens or rights to liens: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454; Capital L. Co. v. Ryan, 34 Oreg. 73, 54 Pac. Rep. 1093. For the mere fact that a former mortgage was released, and a new one taken in place thereof, in ignorance of the existence of an intervening lien, is, in equity, deemed such a mistake of fact as will entitle the plaintiff to relief, although such lien is a matter of record, and, a fortiori, where the intervening right is merely inchoate, such lien or right not being interfered with: Capital L. Co. v. Ryan, supra.

Washington. As to extra work, see Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719.

[32] See Southern Cal. L. Co. v. Peters, 3 Cal. App. 478, 86 Pac. Rep. 816; Goss v. Helbing, 77 Cal. 190, 191, 19 Pac. Rep. 277.

Colorado. Cornell v. Dunbar L. Co., 9 Colo. App. 225, 47 Pac. Rep. 912. But see Seely v. Neill (Colo.), 86 Pac. Rep. 334.

Utah. Fields v. Daisy G. M. Co., 25 Utah 76, 69 Pac. Rep. 528.

Where deed of trust is given of canal or ditch on public lands, which was not constructed, it could not transfer the canal to the trustee until it was constructed, and where claimants are employed to construct the same, their liens take priority over such deed of trust: Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 363, 34 Pac. Rep. 368; **affirmed** in Bear Lake Irr. Co. v. Garland, 164 U. S. 1, bk. 41 L. ed. 327, 17 Sup. Ct. Rep. 7.

[33] Hamilton v. Delhi M. Co., 118 Cal. 148, 152, 50 Pac. Rep. 378. This is the rule, even though the labor is completed and the last of the materials delivered after the judgment is docketed: Barber v. Reynolds, 44 Cal. 519, 534. See Flandreau v. Downey, 23 Cal. 354.

Colorado. Empire L. & C. Co. v. Engley, 18 Colo. 388, 33 Pac. Rep. 153 (lis pendens).

[34] **Utah.** Sanford v. Kunkel, 85 Pac. Rep. 363, 365, 1012 (under Rev. Stats. 1898, § 1384).

lien attaches, or subsequently to the time to which the lien relates, are subordinate to the liens of claimants for work or materials;[35] but the liens of mortgages,[36] deeds of trust,[37]

[35] **Priority of mechanics' liens over subsequent liens:** See note 12 L. R. A. 33.

Colorado. Tritch v. Norton, 10 Colo. 337, 15 Pac. Rep. 680 (1881). See Williams v. Uncompahgre C. Co., 13 Colo. 469, 22 Pac. Rep. 806; and Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129.

Washington. Baker v. Sinclaire, 22 Wash. 462, 61 Pac. Rep. 170, and cases cited in the opinion (under Ballinger's Ann. Codes and Stats., § 5903).

[36] Middleton v. Arastraville M. Co., 146 Cal. 219, 225, 79 Pac. Rep. 889; McClain v. Hutton, 131 Cal. 132, 61 Pac. Rep. 273, 63 Id. 182, 622; Williams v. Santa Clara M. Assoc., 66 Cal. 193, 199, 5 Pac. Rep. 85, 4 West Coast Rep. 616; Kuschel v. Hunter (Cal.), 50 Pac. Rep. 397; Warren v. Hopkins (Cal., Sept. 14, 1897), 110 Cal. 506, 42 Pac. Rep. 986 (grading, under Code Civ. Proc., § 1192); Tapia v. Demartini, 77 Cal. 383, 386, 19 Pac. Rep. 641, 11 Am. St. Rep. 288; Preston v. Sonora Lodge, 39 Cal. 116, 117 (1868); Ferguson v. Miller, 6 Cal. 403, 405 (1850); Crowell v. Gilmore, 18 Cal. 370, 372 (1856).

See §§ 486 et seq., ante.

Mechanics' liens, when superior to earlier mortgages: See note 14 L. R. A. 305.

Fact that the mortgagee was the secretary of a mining corporation during the time of the performance of the labor, subsequent to the record of the mortgage, and that such labor was performed with his knowledge, or even at his request, does not estop the mortgagee, nor have the effect of postponing the lien of his mortgage to laborers' liens: Middleton v. Arastraville M. Co., 146 Cal. 219, 225, 79 Pac. Rep. 889.

Colorado. Folsom v. Cragen, 11 Colo. 205, 17 Pac. Rep. 515 (1883).

The rule that a mechanic's lien attaches to a building in preference to a prior mortgage on the land does not apply where the materialman has notice that the mortgage expressly mentions the structure, and the funds for which it was given were used in the construction thereof: Joralmon v. McPhee, 31 Colo. 26, 34, 71 Pac. Rep. 419, 422.

Idaho. Pacific States S. L. & Bldg. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513. See Rourke v. Bergevin, 4 Idaho 742, 44 Pac. Rep. 645 (chattel mortgage; lien on crops).

Montana. See Davis v. Alvord, 94 U. S. 545, bk. 24 L. ed. 283.

Nevada. Capron v. Strout, 11 Nev. 304.

Utah. See Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 362, 34 Pac. Rep. 368, s. c. 164 U. S. 1, bk. 41 L. ed. 327, 17 Sup. Ct. Rep. 7.

Washington. Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 129, 130, 32 Pac. Rep. 1073, in which it was also held that the fact that a mortgage given in view of a contemplated building contained a provision allowing the mortgagee to pay off any liens that might be created against the property from the amount of the mortgage loan does not estop the mortgagee from disputing the claims of the lienors, and no liability for such liens was assumed by the mortgagee. See Fitch v. Applegate, 24 Wash. 25, 31, 64 Pac. Rep. 147 (under Laws 1897, p. 55, § 1).

[37] Williams v. Santa Clara M. Assoc., 66 Cal. 193, 200, 5 Pac. Rep. 85, 4 West Coast Rep. 616; Valley L. Co. v. Wright, 2 Cal. App. 288, 290, 84 Pac. Rep. 58, even though the advances were actually made after

and encumbrances which were recorded at the time "the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished," dating from the time the lien "attached," or to which it "relates," or of which the lien-holder had notice,[38] take precedence over such liens for labor or materials.[39]

§ 496. **Same. Mortgage for purchase price.** The statute [40] providing that "a mortgage given for the price of real property, at the time of its conveyance, has priority over all other liens created against the purchaser, subject to the operation of the recording laws," does not generally give to the mortgagee priority for the lien of his mortgage over mechanics' liens created by the vendee of the premises prior to the execution of the deed therefor. The latter liens have

the recording of the deed of trust and after the labor and materials were commenced to be furnished, or the lien attached: Id. See Weber v. McCleverty, 149 Cal. 316, 322, 323, 86 Pac. Rep. 706; Kuschel v. Hunter (Cal., Sept. 14, 1897), 50 Pac. Rep. 397.

Oregon. But see Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390; and see notes §§ 459 et seq., ante.

Utah. See Garland v. Bear Lake & R. W. & Irr. Co., 9 Utah 350, 362, 34 Pac. Rep. 368.

[38] Root v. Bryant, 57 Cal. 48, 49, 1 Pac. Coast L. J. 43; Soule v. Dawes, 7 Cal. 575, 577. See Montrose v. Conner, 8 Cal. 344, 347.

Oregon. With reference to notice served on railroad company under Laws 1889, p. 75, see Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Rep. 656.

Washington. See Potvin v. Denny Hotel Co., 37 Wash. 323, 79 Pac. Rep. 940.

[39] **Mortgage lien attaches when instrument executed:** Root v. Bryant, supra; Bank of Ukiah v. Petaluma Savings Bank, 100 Cal. 590, 35 Pac. Rep. 170. See Crowell v. Gilmore, 13 Cal. 56; Union W. Co. v. Murphy's Flat F. Co., 22 Cal. 620, 631; McCrea v. Craig, 23 Cal. 522, 525.

Alabama. Welch v. Porter, 63 Ala. 232.

Federal. In re Coulter, 2 Sawy. C. C. 42, 49, 6 Fed. Cas., p. 637.

Montana. See Johnson v. Puritan M. Co., 19 Mont. 30, 47 Pac. Rep. 337. See Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 991.

Nevada. Capron v. Strout, 11 Nev. 304, 313.

North Dakota. Haxtun S. H. Co. v. Gordon, 2 N. D. 246, 251, 50 N. W. Rep. 708, 33 Am. St. Rep. 779.

Utah. See Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238 (1890); Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764 (before 1890).

Washington. So of a bond to give a deed, which in equity creates the same relation as that existing between a mortgager and a mortgagee: St. Paul & T. L. Co. v. Bolton, 5 Wash. 763, 766, 32 Pac. Rep. 787. See Baker v. Sinclaire, 22 Wash. 462, 61 Pac. Rep. 170.

[40] **Kerr's Cyc. Civ. Code,** § 2898.

priority over the former, under section eleven hundred and eighty-six.[41]

§ 497. Same. Mortgage for future advances. After a mortgage for future advances, whether in money or materials, is recorded, it takes precedence, as against subsequent purchasers or encumbrancers and lien claimants, but the lien of the mortgagee cannot be enforced as against subsequent encumbrances, of which the mortgagee has actual notice, for advancements made after such notice; constructive notice, by the recording of such encumbrances, is not enough. The mortgage may be valid even if it does not disclose upon its face that it is given in part for future advances, if the amount of liability to be incurred under it is expressly limited, and the agreement under which the advances are to be made need not be in writing. If the mortgage discloses upon its face that it is to stand as security for future advancements, the amount of the advances to be made need not be set out, and if the mortgage is sufficiently definite to put subsequent encumbrancers on inquiry, they must ascertain the extent of the mortgagee's lien or suffer the consequences.[42]

[41] **Kerr's Cyc. Code Civ. Proc.,** § 1186; Avery v. Clark, 87 Cal. 619, 627, 25 Pac. Rep. 919, 22 Am. St. Rep. 272. Contra: Guy v. Carriere, 5 Cal. 511, 515 (1850).

But see McClain v. Hutton, 131 Cal. 132, 61 Pac. Rep. 273.

See note 51 Am. St. Rep. 932.

Colorado. See Maher v. Shull, 11 Colo. App. 322, 327, 52 Pac. Rep. 1115.

Oregon. But a mortgage for the purchase price, executed concurrently with the deed, is not postponed to liens for materials furnished prior thereto, as to the land, but is so postponed as to the building: Smith v. Wilkins, 38 Oreg. 583, 585, 64 Pac. Rep. 760.

[42] Tapia v. Demartini, 77 Cal. 383, 387, 19 Pac. Rep. 641, 11 Am. St. Rep. 288.

Colorado. Mortgage given for future advances to erect a building, which was duly recorded, of which claimants had notice, takes precedence of mechanics' liens subsequently attaching, as to advances actually made for the building, especially where the claimants received part payment from the mortgagee, notwithstanding Mills's Ann. Stats., § 2884: Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 421.

Washington. Stetson-Post M. Co. v. Brown, 21 Wash. 619, 627, 59 Pac. Rep. 507, 75 Am. St. Rep. 862; Home S. & L. Assoc. v. Burton, 20 Wash. 688, 56 Pac. Rep. 940, **citing** the California case given above in this note.

§ 498. **Same. What constitutes "further advances."** A payment made by a mortgagee on behalf of the mortgager constitutes an advancement contemplated by a clause of the mortgage securing such future advancements by the mortgagee, only when the payment involves a contract relation, express or implied, and where no such relation is shown, a payment, under the terms of the mortgage, made without the mortgager's knowledge or consent, is not such a further advance.[43]

§ 499. **Same. Reformation and alteration of instruments.** Where the parties to a lease have failed to express their real intentions, it may be reformed as between themselves, but not so as to prejudice the rights of the holders of mechanics' liens acquired without notice, in good faith and for value. The written lease supersedes all oral negotiations or stipulations concerning the removal of improvements, which preceded or accompanied the execution of the instrument, when it is not so reformed, at least, in the action to foreclose such liens.[44] But where the claimant enters into a contract with the owner, and a third party takes a mortgage upon the property, and parts with value, relying upon the terms of that contract, the claimant and owner cannot change the terms of the contract to the detriment of the mortgagee, and the lien, so far as it is extended by the change of the agreement, will not take priority over the mortgage;[45] yet, generally speaking, where no intervening rights are affected, no one can complain of such change by the parties to the contract.[46]

§ 500. **Same. When lien claimants may attack prior encumbrances.** Where the mortgage is prior to the liens,

[43] Provident M. B. L. Assoc. v. Shaffer, 2 Cal. App. 216, 83 Pac. Rep. 274.

Advances must be properly made: See 4 Am. & Eng. Ann. Cas. 615.

[44] West Coast L. Co. v. Apfield, 86 Cal. 335, 340, 24 Pac. Rep. 993.

Montana. As to reformation of mortgage, error in description, see Grand Opera House Co. v. Maguire, 14 Mont. 558, 37 Pac. Rep. 607.

[45] Soule v. Dawes, 7 Cal. 575, 576.

[46] Gamble v. Voll, 15 Cal. 508, 510.

See "Change of Contract," §§ 326 et seq., ante.

claimants can attack it only upon the ground that it was made to hinder, delay, or defraud creditors; but the mere fact that it was without consideration is not equivalent to this, and fraud must be found by the court, in order that the attack may be successful.[47]

§ 501. Same. Garnishment by creditor. Whether or not a garnishment served upon the owner at the instance of a creditor of the original contractor would take precedence of the liens of claimants for labor or materials, does not seem to have been clearly decided in California. Under the present statute the lien upon the fund in the hands of the owner, created by service of notice upon him, being independent of the lien upon the property, resembles, in some respects, the garnishment proceeding under the act of 1855.[48]

[47] Bewick v. Muir, 83 Cal. 368, 371, 23 Pac. Rep. 389, 390.

As to general subject, see note 31 Am. St. Rep. 665.

[48] **As to priority of lien upon the fund, created by service of notice on the owner,** see French v. Powell, 135 Cal. 636, 640, 68 Pac. Rep. 92.

The lien of a subcontractor filed and notice given to the owner of the building within thirty days after the completion of the work, under the act of 1855, attached from the time the work was commenced, and took precedence over a garnishment served on the owner against the original contractor after the work was commenced and before the filing and serving of the notice of lien. Whether the payment by the owner to the original contractor before the notice of the lien of the subcontractor would defeat the lien pro tanto, quære: Tuttle v. Montford, 7 Cal. 358, 360. But —

In Cahoon v. Levy, 6 Cal. 296, 297, 65 Am. Dec. 515 (1850), it was held that a garnishment served on the owner, in a suit against the original contractor, after the commencement of the building and before notice served, prevailed over the lien of the subcontractor: See Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536.

See also "General Creditors," §§ 601 et seq., post, and "Notice," §§ 547 et seq., post.

Colorado. No attachment or garnishment of any money due a contractor from the owner is valid as against the lien of the subcontractor: Schradsky v. Dunklee, 9 Colo. App. 394, 48 Pac. Rep. 666 (under statute); but if the lien is not perfected, the garnishment holds good: Id.

New Mexico. Where a lis pendens was filed in an attachment case, it was held that the attachment lien took precedence over a lien for labor subsequently performed: Bell v. Gaylord, 6 N. M. 227, 27 Pac. Rep. 494.

Oregon. Held that the garnishment of the owner by a general creditor of the contractor takes priority over subsequent notice to the owner served by a subclaimant, under Laws 1889, p. 75, relating to work for railroad companies, providing for liability of owner only to amount due contractor at the time of service of notice: Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Rep. 656.

§ 502. Same. Lien on two or more buildings. Statutory provision. The statute [49] provides: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated." [50] The cases to which this provision applies have been already considered.[51]

§ 503. Same. When provision as to two or more buildings applicable. In enacting section eleven hundred and eighty-eight,[52] the legislature had in mind those cases where it was possible to designate the amount due on each of several buildings, and did not intend that the section should apply to any other class of cases.[53] If materials are fur-

[49] **Kerr's Cyc. Code Civ. Proc., § 1188.**

[50] Dickenson v. Bolyer, 55 Cal. 285, 286; Booth v. Pendola, 88 Cal. 36, 43, 23 Pac. Rep. 200, 25 Id. 1101; Hamilton v. Delhi M. Co., 118 Cal. 148, 151, 50 Pac. Rep. 378; Tredinnick v. Red Cloud M. Co., 72 Cal. 78, 84, 13 Pac. Rep. 152 (judgment; consolidated mining claim). See Williams v. Mountaineer G. M. Co., 102 Cal. 134, 141, 34 Pac. Rep. 702, 36 Id. 388; Lothian v. Wood, 55 Cal. 159, 163.

See § 504, post, and "Claim," §§ 378, 406, ante.

Idaho. Postponing lien: Phillips v. Salmon R. M. & D. Co., 9 Idaho 149, 72 Pac. Rep. 886.

New Mexico. See Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087.

Oregon. See Smith v. Wilcox, 44 Oreg. 323, 75 Pac. Rep 710, 74 Id. 708.

Utah. The statement required by Rev. Stats. 1898, § 1387, is for the purpose of enabling the court to protect the interests of lien claimants among themselves: Eccles L. Co. v. Martin, 87 Pac. Rep. 713. See Garner v. Van Patten, 20 Utah 342, 58 Pac. Rep. 684.

Washington. Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001. See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720, 68 Id. 389.

[51] See §§ 366, 378, 406, and 448, ante.

[52] **Kerr's Cyc. Code Civ. Proc., § 1188.**

[53] Southern Cal. L. Co. v. Peters, 3 Cal. App. 478, 86 Pac. Rep. 816.

See §§ 378, 406, 448, and 366, ante.

Distribution of fund, order of priority among claimants: See Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681, 683.

nished upon a single order, and all under one contract, by the owner's material-man, to be used in all of a number of buildings, without anything to show how much of it was to be used in each building, it is impossible for the claimant to designate in the claim of lien the amount due to him on each of such buildings, under the statutory provision above mentioned, as there is nothing due him on each of the buildings, his claim existing against the buildings jointly.[54]

§ 504. Priorities inter sese.[55] Statutory provision. Unless the statute provides for priorities among liens for labor or material, the claimants stand upon an equal footing.[56] But section eleven hundred and ninety-four[57] provides: "In every case in which different liens are asserted against any property, the court in the judgment must declare the rank

Colorado. Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179.

New Mexico. See Boyle v. Mountain K. M. Co., 9 N. M. 237, 50 Pac. Rep. 347.

Utah. See Eccles L. Co. v. Martin, 87 Pac. Rep. 713, 718 (under Rev. Stats. 1898, § 1387).

[54] Southern Cal. L. Co. v. Peters, 3 Cal. App., 478, 86 Pac. Rep. 816, the court saying, "Assuming, without deciding the question, that a trust deed constitutes a lien upon the property within the provisions of said section, we are still of the opinion that plaintiff's claim of lien does not come within the section."

[55] **As to claim on two or more buildings,** see §§ 366, 378, 406, 448, and 502, ante.

[56] Moxley v. Shepard, 3 Cal. 64, 65 (1850). See In re Hoyt, 3 Biss. C. C. 436, 441, 12 Fed. Cas., p. 758.

See also note 79 Am. Dec. 277.

And, under such circumstances, this is the rule, even if some commenced work after the others: Crowell v. Gilmore, 18 Cal. 370, 372 (1856), in which it was held that the statute did not give preference to lien-holders inter sese; there being no original contract, the owner's laborer performing labor before the execution of a mortgage would take precedence over the same, and those employed subsequently thereto would be postponed to the mortgage.

See §§ 486 et seq., ante.

In Snell v. Payne, 115 Cal. 218, 46 Pac. Rep. 1069, it is said that where an overstatement of the amount due on a claim of lien for materials furnished for the erection of buildings is upon its face a clerical error, it will not invalidate the lien, and, at most, can only postpone it to the other liens; but the court cites no authority for the last point, which seems to be dictum.

See "Notice," §§ 547 et seq., post.

Montana. Under act of 1865, priority was given in order of filing account and claim: Mason v. Germaine, 1 Mont. 267.

Oregon. Willamette Falls Co. v. Riley, 1 Oreg. 183

[57] **Kerr's Cyc. Code Civ. Proc.,** § 1194.

of each lien, or class of liens, which shall be in the following order, viz.: 1. All persons performing manual labor in, on, or about the same; 2. Persons furnishing materials; 3. Subcontractors; 4. Original contractors. And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank." [58]

§ 505. **Same. Nature of provision.** It will be observed that the provision set forth in the last preceding section ranks liens according to their quality, and not according to their order in point of time, thus differing in principle from section eleven hundred and eighty-six,[59] discussed in preceding sections.[60] It may sometimes happen that the land is subject to subliens under separate original contracts, and it seems that the court is to rank subclaimants under the valid original contract under which they claim respectively. Thus —

Where the valid original contract is abandoned,[61] a subsequent valid original contract between the owner and another original contractor for the completion of the work is as disconnected from the first original contract as if it were for the construction of a different building; the court saying, "It would be contrary to the manifest policy of the law upon this subject to hold that those who had furnished the labor and materials for the performance of this second contract should be postponed in the payment therefor until after the con-

[58] **Where there is an original contract,** the subordination of the lien of the original contractor to those of his subclaimants is carefully preserved by other provisions of the code: See **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1184, and notes.

Idaho. See Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 397, 59 C. C. A. 200.

Utah. But see Carey-Lombard L. Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572 (1890), which seems to give priority to subcontractors in accordance with the time when they commenced to furnish materials or do work (dictum); and see Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238 (1890), which holds that priority is given a subcontractor by filing the notice of intention to furnish materials over any other subcontractor who may commence to do work or to furnish materials between the date of his making the contract and the date of his entering upon the performance of it.

[59] **Kerr's Cyc. Code Civ. Proc.,** § 1186.

[60] See §§ 487 et seq., ante.

[61] See "Abandonment," §§ 358 et seq., ante.

tract price of their contractor had been absorbed in the satisfaction of claims entirely disconnected with the contract under which they had furnished this labor and materials." [62]

§ 506. **Same. Effect of constitution on statutory provision.** The constitution of California places mechanics, material-men, artisans, and laborers of every class, who bestow labor or furnish material upon or for a building, on an equal footing as to priority; and such equality cannot be impaired or destroyed by the legislature; and section eleven hundred and ninety-four,[63] in so far as it attempts to destroy the equality of such constitutional mandatory liens, is unconstitutional, but so much of the provision as relates to the preference of laborers and material-men to contractors and subcontractors, and subcontractors to contractors, does not violate the constitution.[64]

§ 507. **Same. Insufficient proceeds. Prorating.** Subject to the rules stated in the sections immediately preceding,[65] and in subordination to the constitutional limitations as to the constitutional mandatory liens, which have been fully developed in the foremost portion of this work,[66] where there are insufficient proceeds to satisfy all claims in the same rank, they should be prorated among those in the same rank.[67]

[62] Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651. See Green v. Clifford, 94 Cal. 49, 51, 29 Pac. Rep. 331.

Quære: What is the rank of an owner's laborer or material-man whose claim is filed before an original contract is entered into? See Barber v. Reynolds, 44 Cal. 519, 533.

See also §§ 486 et seq., ante.

Idaho. But see Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513.

[63] **Kerr's Cyc. Code Civ. Proc.,** § 1194.

[64] Miltimore v. Nofziger Bros. L. Co. (Cal. Sup., April 2, 1907), 90 Pac. Rep. 114; Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262.

See §§ 28, 42, ante.

[65] See §§ 504 et seq., ante.

[66] See § 42, ante.

[67] See Moxley v. Shepard, 3 Cal. 64, 65 (1850).

Colorado. Action to marshal lien: See San Juan H. Co. v. Carrothers, 7 Colo. App. 413, 43 Pac. Rep. 1053.

CHAPTER XXVI.

OWNER, EMPLOYER, OR PERSON CAUSING IMPROVEMENT TO BE MADE.

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§ 545. Same. Personal liability to subclaimants under void contract.
§ 546. Same. False representations by owner as to completion of building.

§ 508. Owner [1] and employer, or purchaser. Distinction. The distinction must always be observed between the "owner" of the property, and the "employer" of the contractor or claimant, or purchaser of the materials; for the two latter, or the person who "caused the building to be erected," may not be the owner.[2] In the discussion in this and the following chapters, the word "owner" may be generally taken to include the "person who caused the improvement to be made," unless otherwise shown by the context. The "owner" mentioned in the statute [3] refers to the one holding the legal title; and a mere vendee under a contract of sale is not the "owner." [4]

[1] **Infant and guardian as "owner":** See "Contract," § 199, ante.
See also §§ 203, 204, 236, ante.
Utah. Death of owner; presentation of claim to executrix, subcontractors' material-man: Eccles L. Co. v. Martin, 87 Pac. Rep. 713, 715.

[2] See Corbett v. Chambers, 109 Cal. 178, 182, 41 Pac. Rep. 873; Marchant v. Hayes, 120 Cal. 137, 139, 49 Pac. Rep. 840.
See "Due Process of Law," §§ 32 et seq., ante.

[3] **Kerr's Cye. Code Civ. Proc.,** § 1183.

[4] Hinckley v. Field's B. & C. Co., 91 Cal. 136, 139, 27 Pac. Rep. 594 (decided before amendment of 1903).
See "Original Contractor," §§ 45 et seq., ante.
Colorado. The grantee in a deed placed in escrow is the "owner": Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989.
Work must be done and material furnished by contract with owner, and the claimant must ascertain for himself whether the other party to the contract has or has not an interest in the land. This has been clearly decided by the Colorado supreme court in Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458, 459. The party through whose contract the claimant derives his right to file a lien must have an interest in the land, or a claim to the land. Such is the statutory language. The grantor's lien is certainly not a claim to the land or an interest in it, nor has it ever been so held. It has been directly decided otherwise by the supreme court: Fallon v. Worthington, 13 Colo. 559, 22 Pac. Rep. 960, 6 L. R. A. 708. That was a well-considered case, and is a lucid and accurate statement of the law by Commissioner Pattison. Therein it was held that such a lien was but a chose in action. It excludes any idea of ownership. It was further held that this lien, whether it arose from a contract, or was implied by the law from equitable considerations and circumstances, conferred no right to the property on the holder. As it was said, quoting from another

§ 509. Owner and reputed owner. The code [5] now makes the distinction between the "owner" and the "reputed owner." The intention of the legislature seems to be, that, in reference to actual contractual relations between the "reputed owner" and the claimant, such "reputed owner" should be bound according to the rules of the common law and by the statutory liability imposed upon his interest in the property, and upon him personally, by the service of a notice upon him of the claims of subclaimants, in the nature of a garnishment, under section eleven hundred and eighty-four,[6] thus creating a lien upon the fund, independently of the lien upon the property, and that, so far as such contract affects the interest of the real owner in the land, such interest should only be affected upon the principle of estoppel, statutory or equitable.[7]

case, "It is neither jus ad rem nor jus in re." This being true, and this being its definition, it cannot be legitimately contended the grantor's lien was an interest in or a claim to the property. It was simply a naked, equitable right, which might be enforced in equity, and reinvest the grantor with the title which had passed: Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809.

Before the amendment of the mechanic's-lien law of 1883, which only authorized a lien under contract of the owner, persons having a vendor's lien on the property, although in possession thereof, are not the owners of the property within the meaning of the statute, and such contract made with them cannot form the basis of the lien: Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809.

A contract to perform labor upon a mine, upon the completion of which the laborer was to receive an undivided interest in the property, does not constitute him the owner or agent of the owner, within 3 Mills's Ann. Stats., 1st ed., § 2867: Maher v. Shull, 11 Colo. App. 322, 327, 52 Pac. Rep. 1115.

Interest of owner not liable under contract with lessee, under 3 Mills's Ann. Stats., 1st ed., § 2873: Morrell H. Co. v. Princess G. M. Co., 16 Colo. App. 54, 63 Pac. Rep. 807.

Owner leasing mine in small blocks, under Session Laws 1895, p. 202: See Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612.

Montana. Section 2140, Code Civ. Proc., points out the person whose interest is to be charged with the lien, and is the proper person to be named in the claim: Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

[5] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183, 1184, as amended in 1887, inserting the word "reputed" before "owner."

[6] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[7] See "Constitutional Aspects," §§ 28 et seq., ante; "Estoppel," §§ 469 et seq., ante; also "Notice," §§ 547 et seq., post.

The expression "reputed owner" seems to be used synonymously with the expression "the person who contracted with the contractor," in § 1184, **Kerr's Cyc. Code Civ. Proc.,** and with the expressions "employer" and "person who caused" the building to be constructed, in §§ 1185 and 1187, **Kerr's Cyc. Code Civ. Proc.**

§ 510. General rights of owner and employer. Scope of discussion. The general rights of the owner or employer, measured by the correlative duties owing to him by claimants, have already been discussed in several places.[8] It will therefore be unnecessary to discuss in detail what has elsewhere been developed in full. General statements, only, as to such matters may consequently be looked for in this chapter.

§ 511. Same. Rights against contractor. Statutory provision. Where liens are filed, and actions commenced to foreclose the same, the statute provides that "the owner may withhold from the contractor the amount of money for which [such] lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of said judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."[9]

[8] See "Obligations of Original Contractor," §§ 64 et seq., ante; "Of Subcontractors," § 76, ante; "Of Material-man," §§ 102 et seq., ante; "Of Laborers," §§ 117 et seq., ante. See also "Valid Contract," §§ 315 et seq., ante; "Void Contract," §§ 319 et seq., ante; "Extent of Lien," §§ 459 et seq., ante; "Completion of Contract," §§ 334 et seq., ante; "Estoppel," §§ 469 et seq., ante.

[9] **Kerr's Cyc. Code Civ. Proc.,** § 1193.

In Boas v. Maloney, 138 Cal. 105, 107, 70 Pac. Rep. 1004, the court stated (obiter) that the owner could hold the contractor liable for liens filed against the owner's property in excess of the contract price, where the contract is void. A material-man, giving notice that claims for material furnished for the construction of a building after the delivery of an order for payment due the contractor in accordance with the terms of the contract, and after the same has been assigned to a bona fide purchaser for value, cannot enforce his claim against the owner of the building to the extent of such order: Long Beach S. Dist. v. Lutge, 129 Cal. 409, 62 Pac. Rep. 36, **explaining** Newport W. & L. Co. v. Drew, 125 Cal. 585, 58 Pac. Rep. 187.

Montana. A judgment in favor of a subcontractor in a suit by him against the principal contractor is not res judicata as to the owner: See Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054; Duignan v. Montana Club, 16 Mont. 189, 40 Pac. Rep. 294 (1887).

§ 512. Same. General rule as to non-payment of instalments. In accordance with the statutory provisions set forth in the last preceding section, if any lien exists upon the property at the time when an instalment, under the terms of a valid statutory original contract, would otherwise become due, the existence of such lien is sufficient excuse for non-payment of such instalment.[10]

§ 513. Same. Right to cancel contract. In those cases where the contract is void for failure to comply with the statute, the owner cannot maintain an action, under certain circumstances, to cancel the contract, nor, if valid, can he do so where he does not offer to do equity, by reimbursing the contractor who has incurred expense in placing building material on the ground and in commencing work and operations under the contract.[11]

§ 514. Same. Right of owner to retain fund. Where the promise of the contractor to protect the buildings from liens, and the promise of the owner to pay for the work done thereon, are mutual and dependent, the owner is authorized to retain the money due the contractor, to meet the liens filed against the property.[12]

Oregon. Right to require production of receipted bills before making final payment: Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 97, 75 Am. St. Rep. 574.

See "Obligations of Original Contractor," §§ 64 et seq., ante.

[10] Wyman v. Hooker, 2 Cal. App. 36, 40, 83 Pac. Rep. 79.

[11] Sullivan v. California R. Co., 142 Cal. 201, 204, 75 Pac. Rep. 767.

[12] Ernst v. Cummings, 55 Cal. 179, 184.

See "Construction," §§ 216 et seq., ante.

Utah. The owner may retain sufficient to cover subclaimants' liens and pay the same; but in no other respect relating to the subcontract price is the owner concerned: Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781.

Washington. Where the original contract obligates the contractor to supply all materials and labor, and a bond is given to secure the performance of the conditions of the contract, the owner is entitled to maintain an action on the bond without first paying mechanics' liens or suffering judgment therefor to be taken. The owner is not obliged to delay action on such bond, but may treat the contractor's failure to keep the property free from encumbrances as a breach of the contract. The owner, however, is not obliged to do so, but may wait until the lien has been adjudged to be a charge on her property, and thus escape the burden of proving the validity of such liens and the amount of the indebtedness: Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794, 797.

§ 515. Same. Offsets and counterclaims. Generally. The owner may take an assignment of the claims of subclaimants after the claims are filed, and offset them against the contractor.[13] If a contract provides that the contractor, after the acceptance of the work contracted for, shall cancel and release the property from all claims that may have accrued in carrying out the work, a lien on the property, paid by the owner for materials put into the building, including attorneys' fees and all expenses connected with it, may be allowed as a counterclaim, and deducted from the amount otherwise due the contractor, under section eleven hundred and eighty-three of the Code of Civil Procedure; and that is all that the owner has a right to demand.[14]

In case of a valid statutory original contract, while it marks the limit of the owner's liability, and the payment of the final twenty-five per cent before the thirty-five days after the completion of the contract, under section eleven hundred and eighty-four,[15] may be void,[16] and the employer's interest in the property may be liable for the same; yet if the employer has any "lawful credits," under section twelve hundred,[17] or otherwise, it was at first held that he is entitled to the same, to be deducted from said twenty-five per centum.[18]

Completion payment. If the owner is obliged to furnish material and labor to complete a contract abandoned by the contractor, or if material of cheaper value is substituted in the building, the owner may claim an allowance for any of these matters, to be deducted from the payment due upon completion, if such allowance were contemplated by the terms of the valid contract, and likewise liquidated damages

[13] Shaw v. Wandesforde, 53 Cal. 300, 302.

See § 636, post.

[14] Wyman v. Hooker, 2 Cal. App. 36, 40, 83 Pac. Rep. 79.

[15] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[16] See §§ 274 et seq., ante.

[17] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

[18] Reed v. Norton, 90 Cal. 590, 593, 602, 26 Pac. Rep. 767, 27 Id. 426 (what such "lawful credits" might be does not clearly appear from the opinion).

See §§ 317, 318, ante, and see §§ 516 et seq., post.

Right of owner to credits, as against the original contractor: See California I. C. Co. v. Bradbury, 138 Cal. 328, 332, 71 Pac. Rep. 346, 617.

for delay, being a deduction or offset which, but for the lien law, the owner would have the right to counterclaim against the amount found due under the contract.[19]

Final payment. It has recently been held that the fund amounting to twenty-five per cent of the contract price, to be held thirty-five days after the completion of the building, in case of a valid contract, is practically the only money available to meet the demands of lien claimants, aside from the liability of the owner as fixed by notice to withhold payments, and this amount cannot lawfully be depleted or reduced to the injury of such claimants; and if there be no completion payment provided for in such contract, or it be more than exhausted by the demands of the owner, then the excess of such demand cannot be made a charge against such final payment of twenty-five per cent, as the same is a legislative sequestration to meet the demands of claimants; and for such excess the owner's right of recovery is against the contractor alone.[19]

§ 516. **Same. Offsets and counterclaims against different payments.** In reference to the provisions of section eleven hundred and eighty-four,[20] that the whole contract price shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim in favor of the reputed owner and against the contractor, the claim has reference, in the first place, to offsets not arising under the terms of the contract, and as to which, from an inspection of the contract, material-men and laborers could have no notice. Manifestly, it would be unjust if, as against the demands of such, the owner were allowed to plead, in reduction of the contract price, some claim against the contractor as to which, in the very nature of things, they could have had no notice. These classes of offsets or counterclaims, whether arising before the execution of the contract, or subsequent thereto, are all

[19] Hampton v. Christensen, 148 Cal. 729, 735, 84 Pac. Rep. 200.

Owner entitled to credit for payment of claims before filing lien: See Dunlop v. Kennedy (Cal., Aug. 31, 1893), 34 Pac. Rep. 92 (rehearing granted).

[20] **Kerr's Cyc. Code Civ. Proc., § 1184.**

excluded.[21] But, upon the other hand, certain matters of offset, if provided for by the terms of the contract itself, may, both with justice and legality, be allowed.

Abandonment by contractor, etc. If the owner, for example, is obliged to furnish material and labor to complete a contract abandoned by the contractor, or if material of cheaper value is substituted in the building, or if, upon default of the contractor to complete, the owner enters into the possession of the uncompleted building, no one could question the justice of the owner's claim for an allowance for any of these matters, if an allowance for them was contemplated by the provisions of the contract; for the contract price is established and agreed to in express contemplation of the fact that the particular material shall be used, and that the building shall be turned over to the owner completed. If the particular materials are not used, if the building is turned over uncompleted, so that the owner has to accept it unfinished, or complete it at his own cost, there has been a failure by so much to put the amount of the contract price into the structure, and it would be manifestly unjust that the owner should be expected to pay for that which, without any fault of his own, he has not received.[22]

Items of damages for failure to complete in time differ somewhat from the damages where the loss was occasioned by the necessity of the owner to make good the deficiencies of the contractor in the furnishing of omitted material. It is a perfectly legal contract which makes time of completion of its essence, and provides that the contractor, for a failure to perform in time, shall make good to the owner such loss as the latter may sustain thereby. More than this, it is a deduction or offset which, but for the lien law, the owner would have the unquestioned right to claim from the amount found due the contractor under the contract.[22]

Final payment. After providing that no payment shall be made until the commencement of the work, the legislature

[21] See Dore v. Sellers, 27 Cal. 593; Schmid v. Busch, 97 Cal. 188, 31 Pac. Rep. 893.

[22] Hampton v. Christensen, 148 Cal. 729, 736, 737, 84 Pac. Rep. 200. The case of Reed v. Norton, 90 Cal. 590, 593, 26 Pac. Rep. 767, 27 Id. 426, was not noticed in this opinion.

sets aside a fund amounting to twenty-five per cent of the contract price, to be held for thirty-five days after the completion of the building, and this fund, in case of a valid contract, is practically the only money available to meet the demands of the lien claimants. Whatever may be said of other payments, this amount of money cannot lawfully be depleted or reduced to the injury of any such claimant. If it could be, it would be setting at naught the constitutional provision granting a lien for the full value of the labor done or material furnished.[22]

Completion payment. Upon the other hand, ample opportunity is accorded to the owner by the California law to protect himself against all derelictions, omissions, and neglects upon the part of the contractor. And this he may do by providing for reserved payment to be made on completion, sufficiently large to protect himself against any violation of the contract. In case of such violation, there would then be justly chargeable against the completion payment, and chargeable as a first demand upon the fund, such sums as the owner might prove due him in recoupment for damages. Out of this payment would therefore first come (if contemplated by the terms of the contract) the necessary cost to the owner of completion in case of abandonment, the cost of making good trifling imperfections and omissions, and the proved damages in case of failure to complete on time. But if there be no such completion payment provided for in the contract, or if such completion payment be more than exhausted by the demands of the owner, then the excess of such demand cannot be carried over and made a charge against the twenty-five per cent final payment, to the injury of any lien claimant thereon; for, as has been said, since this final payment is the only fund which the legislature has sequestered to meet the demand of the lien claimants, to permit this would be to deprive them of their constitutional right to a lien.[22]

[22] Hampton v. Christensen, 148 Cal. 729, 736, 737, 84 Pac. Rep. 200. The case of Reed v. Norton, 90 Cal. 590, 593, 26 Pac. Rep. 767, 27 Id. 426, was not noticed in this opinion.

§ 517. Same. Damages for delay in performance. The consent on the part of the owner that the defendants continue the work after the stipulated time is not, of itself, a waiver of damages, or of the breach of the contract. Upon a breach, the owner, not being himself in default, has the right to rescind, or permit the defendant to complete the work and sue for damages caused by the default.[23]

[23] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637.

Damages not recoverable for delay, where contract was modified by mutual consent: See Boothe v. Squaw Springs W. Co., 142 Cal. 573, 579, 76 Pac. Rep. 385.

Exclusion of evidence as to damages for delay: See Boothe v. Squaw Springs W. Co., 142 Cal. 573, 579, 76 Pac. Rep. 385.

See § 516, ante.

Liquidated damages. Stipulation for. Literal enforcement: See 1 Am. & Eng. Ann. Cas. 950.

Hawaii. Action for damages for breach of contract: McGrew v. Barnes, 7 Hawn. 90.

Oregon. The measure of damages was held to be the difference between what it would cost the owner to finish the building and what he would have had to pay the contractor under the contract, together with the probable rental value of the building during the delay, less such work and materials used by the owner in completing the building, but not including materials on the ground unattached to the building, which were held to belong to the contractor: Savage v. Glenn, 10 Oreg. 440. See Glenn v. Savage, 14 Oreg. 567, 13 Pac. Rep. 442.

When owner is entitled to damages against contractor for delay in performance of the contract, the contractor is entitled to deduct therefrom for delays occasioned by the owner himself: Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126, 130.

Recovery by owner of excess of contract price, under Hill's Ann. Laws, § 3679: Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649, 60 Id. 1.

Utah. Where interest is recoverable, not as a part of the contract, but by way of damages, the giving or withholding thereof is largely in the discretion of the court, and laches of parties may be considered in the award: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008.

Washington. A property-owner may counterclaim damages resulting from the act of a paving contractor in placing earth, excavated from the streets, on the owner's lot, in an action by the assignee of the contractor to establish a lien on the property: Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 139, 421 (under Ballinger's Ann. Codes and Stats., § 4835).

Damages for delay in completing building. As long as the contractor endeavors to fulfil the contract, and complete the building in good faith, the owner is under no obligation to interfere with him, and need not take charge of the building or complete it, in order that the amount of damages for delays may be lessened, so far as the contractor's surety is concerned: Leghorn v. Nydell, 39 Wash. 17, 80 Pac. Rep. 833.

Costs and expenses reasonably necessary to make work conform to original contract may be recovered by the owner from the contractor for failure to carry out the contract, notwithstanding that the owner

§ 518. Same. Completion of contract by owner. Where the contractor is prevented by the owner from completing a non-statutory original contract, unless there is a balance due to the contractor at the time of abandonment, or the building is completed by the owner at a cost less than the contract price, a subclaimant has no lien.[24]

§ 519. Same. Right to complete construction upon abandonment. Where the contract is for less than one thousand dollars, and is filed, and the contractor abandoned the building when it was half completed, and the contract provided that the price was to be paid upon the completion of the building, it was held that the owner had an undoubted right to proceed with the construction and complete the building substantially as called for under the contract.[25]

had sold the house, and that there was no evidence of payment for repairing any defects, or of the sale of the property, on account of defects, for less than otherwise would have been obtained. Such damages are personal: Ekstrand v. Barth, 41 Wash. 321, 83 Pac. Rep. 305.

No waiver of claims for damages under an agreement whereby owner occupied premises: See Long v. Pierce Co., 22 Wash. 330, 61 Pac. Rep. 142, 151.

Action for damages: Main I. Co. v. Olsen (Wash.), 86 Pac. Rep. 1112.

Damages for failure of owner to permit claimants, whose claims are merged under judgment of foreclosure of liens, to occupy premises under a forfeited leasehold interest subject to the lien: See Stetson & Post M. Co. v. Pacific A. Co., 37 Wash. 335, 79 Pac. Rep. 935.

Wyoming. When the contractor violates his contract as to the work or material, to the substantial injury of the owner, the latter may either "refuse to pay the contract price . . . to the amount for which he is damaged, or he may pay for and take possession of the buildings and then sue and recover of the builder the amount of his damages. And he can recover, whether he knew of the breach of contract by the other party at the time of payment or not. In neither case is there any waiver of his rights under the contract": Halleck v. Bresnahen, 3 Wyo. 75, 2 Pac. Rep. 537.

See also §§ 334 et seq., ante.

[24] Turner v. Strenzel, 70 Cal. 28, 30, 11 Pac. Rep. 389 (decided under the law before the amendment of § 1183, creating statutory original contracts, and before § 1200, Code Civ. Proc., was enacted). See McConnell v. Corona City W. Co., 149 Cal. 60, 63, 85 Pac. Rep. 929.

See "Prevention," § 339, ante.

Oregon. See Justice v. Elwert, 28 Oreg. 460, 43 Pac. Rep. 649.

[25] Denison v. Burrell, 119 Cal. 180, 183, 51 Pac. Rep. 1. See Scammon v. Denio, 72 Cal. 393, 14 Pac. Rep. 98.

See "Obligations," §§ 523 et seq., post; "Answer," §§ 747 et seq., post.

Washington. See, as to right to complete building after the contractor's abandonment, Brodek v. Farnum, 11 Wash. 565, 570, 40 Pac. Rep. 189.

In case of mutual abandonment of the work, it has been held that the right of the owner to complete the building or other improvement without waiting thirty days' suspension of labor is derived from the statute, and that where the right of completion is given by the contract itself, no cessation of labor for any number of days is a condition precedent to the owner's right of completion, and that such completion is a completion under the contract.[26]

§ 520. Same. Right to materials upon abandonment. The statute provides that in case the contractor fails to perform his contract in full, or abandons the same before completion, the materials then actually delivered or on the ground belong to the owner.[27] This provision, proprio vigore, conveys title from the contractor to the owner, and the limitations upon the same have not yet been developed in California.

§ 521. Same. Rights against others. The general rights of the owner against claimants other than the contractor, the same being correlative to the duties owing by such persons to the owner, have already been somewhat considered under various heads, which are noted below.[28] The rights

[26] Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

Confounding "abandonment" and "cessation." This case, however, seems to confound actual abandonment with that cessation from work which, under the statute, would be equivalent of completion for the purpose of filing claims of lien: See discussion, §§ 348 et seq., ante; and §§ 358 et seq., ante.

[27] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

See "Abandonment," §§ 358 et seq., ante. See § 526, post.

Oregon. But, as to materials belonging to contractor, see Savage v. Glenn, 10 Oreg. 440.

Washington. See Potvin v. Denny H. Co., 37 Wash. 323, 79 Pac. Rep. 940.

[28] **As to affecting liens of others,** see **Kerr's Cyc. Code Civ. Proc.,** § 1201; and see Middleton v. Arastraville M. Co., 146 Cal. 219, 225.

See "Waiver," §§ 627 et seq., post; "Impairment of Liens," §§ 284 et seq., ante; "Alteration of Contract," §§ 326 et seq., ante.

As to rights with reference to sale, see §§ 948 et seq., post.

Indemnifying owner against liens. Effect on material-man. The contractor and owner cannot deprive the material-man of his lien by a clause in the contract by which the contractor agrees to indemnify the owner against any liens imposed by persons furnishing materials to be used in constructing: Whittier v. Wilbur, 48 Cal. 175, 177 (1868).

For extent of application of provisions of § 1184, **Kerr's Cyc. Code Civ. Proc.,** as to right of set-off, see "Payments," §§ 269 et seq., ante.

of the owner against third persons not lien claimants will be considered hereafter.[29]

§ 522. **Same. Payments.**[30] Where there is no personal liability against the owner, he is not at liberty to pay, without the consent of all the parties, the amounts claimed upon the lien.[31] Where money is paid to a subcontractor on general account by the contractor, and is not paid to the contractor by the owner, the latter has no right to require it to be applied to the account of his own building contract.[32]

Subclaimants cannot complain of payments when. Subclaimants have no right to complain of volunteer payments by the owner beyond the contract price.[33]

§ 523. **General obligations of owner and employer.**[34] **Scope of discussion.** It is not intended to treat at length of matters elsewhere more fully considered, nor of the general

See also "Answer," §§ 753 et seq., post; "Conspiracy as to Contract Price," § 314, ante.

Montana. The owner cannot enforce any contract between the principal contractor and the latter's subcontractor, and can have no action against the subcontractor for a breach of such subcontract: Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054, 1055.

Washington. Where a vendee, who had forfeited his rights under an unrecorded contract of sale, which provided that the improvements should remain upon the land, leased the land to a lessee, who had no knowledge of such contract, and who erected improvements with the knowledge of the owner, the latter is estopped to declare a forfeiture of the contract of sale to the prejudice of the lien of the lessee's material-man upon the improvement: Bell v. Groves, 20 Wash. 602, 56 Pac. Rep. 401.

[29] See chapter on "Third Persons," §§ 585 et seq., post. See also §§ 486 et seq., ante.

[30] **Oklahoma.** Payment of advances to contractor, not avoiding the conditions of contractor's bond: See American S. Co. v. Scott, 90 Pac. Rep. 7.

[31] Wilson v. Samuels, 100 Cal. 514, 519, 35 Pac. Rep. 148; Covell v. Washburn, 91 Cal. 560, 563, 27 Pac. Rep. 859.

See "Obligations of Owner," §§ 523 et seq., post.

[32] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 365, 27 Pac. Rep. 743 (syllabus misleading).

See "Payments," §§ 251 et seq., ante.

[33] Southern Cal. L. Co. v. Jones, 133 Cal. 242, 245, 65 Pac. Rep. 378.

See § 535, post.

[34] **Liability of owner for failure to file contractor's bond,** under § 1203, **Kerr's Cyc. Code Civ. Proc.,** damages limited to the amount of lien claims not exceeding twenty-five per cent of the contract price: See Gibbs v. Tally, 63 Pac. Rep. 168, s. c. **reversed,** 133 Cal. 373, 65 Pac. Rep. 970, 60 L. R. A. 815 (unconstitutional).

See "Bond," § 281, ante.

correlative rights of lien claimants. Inquiry must be made in other parts of this work for more detailed development of the general statements contained in this chapter, as partially indicated in the note.[35]

§ 524. Same. Duty to file statutory original contract. Of the duty of the owner or employer to see to it that the statutory original contract is filed, the supreme court has said: "It is said that this view works a hardship to the respondents. This is probably so, for this particular law frequently works a hardship to owners of property; but it has been heretofore pointed out to such owners that in making contracts for building they must be careful to comply with the statute. . . . While the mechanic's-lien law certainly interferes to a great extent with the right of a property-owner to contract according to his own best judgment for the erection of improvements thereon, still it is apparent that the property-owner might take advantage of mechanics and laborers by making a contract with a contractor financially irresponsible for the construction of a house actually worth twice the amount of the named contract price." [36]

§ 525. Same. Duty to withhold payments. If the proper notice is given to the owner, it is his duty to withhold from

Duty of owner to see to it that bond of contractor is filed, under § 1203, declared unconstitutional: See Mangrum v. Truesdale, 128 Cal. 145, 146, 60 Pac. Rep. 775.

Obligations of owner on contract to pay instalments: See Flinn v. Mowry, 131 Cal. 481, 485, 63 Pac. Rep. 724, 1006.

[35] See "Original Contractor," §§ 61 et seq., ante; "Of Subcontractor," §§ 70 et seq., ante; "Of Material-men," § 101, ante; "Of Laborers," §§ 112 et seq., ante; "Valid Contract," §§ 315 et seq., ante; "Void Contract," §§ 319 et seq., ante; "Extent of Lien," §§ 438-507, ante; "Performance," §§ 334 et seq., ante; "Notice of Non-responsibility," §§ 469 et seq., ante.

Colorado. See Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 84 Am. St. Rep. 49, 48 L. R. A. 340.

Idaho. Duty to employ competent and honest engineer: See Spaulding v. Cœur D'Alene R. & N. Co., 5 Idaho 528, 51 Pac. Rep. 408.

Montana. Held to be the duty of the owner to see to it that the subcontractors were paid before paying contractor: Gould v. Barnard, 14 Mont. 335, 36 Pac. Rep. 317.

Oregon. Liability of railroad company under Laws 1889, p. 75: See Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Rep. 656.

[36] San Francisco L. Co. v. O'Neil, 120 Cal. 455, 456, 52 Pac. Rep. 728. See § 294, ante, and "Spirit of the Law," § 6, ante.

the contractor the sum due him, or sufficient to meet the claims of claimants;[37] and where a notice to withhold, served on behalf of a lien claimant, though inartificially drawn, is sufficient under the statute, it is the duty of the owner to withhold sufficient funds to pay the claimant's demand, together with estimated costs; and his subsequent payments, after service of that notice, even though legal and within the contemplation of the contract, cannot be allowed to affect so much of the fund as was thus set apart by force of this notice, which operated in the nature of a garnishment.[38]

§ 526. **Same. Liability of owner on breach or abandonment. Statutory provision.** The statute[39] provides: "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be

[37] Russ L. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747.

See "Notice," §§ 547 et seq., post.

Obligation to withhold moneys: See Valley L. Co. v. Struck, 146 Cal. 266, 270, 80 Pac. Rep. 405.

Colorado. When notice is given to the owner, he is required to withhold payments from the contractor of sufficient money due or to become due to answer the claims. If such notice is not given, he is not required to withhold the money: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789.

Hawaii. Retention of money due to contractor a protection to owner: Allen v. Redward, 10 Hawn. 151, 157.

Utah. Owner is bound to take notice of the liens of subclaimants, and any payments made to the contractor after such lien attached must be held to have been at the owner's risk and peril: Sierra Nevada L. Co. v. Whitmore, 24 Utah 130, 66 Pac. Rep. 779, 781.

Deduction from amount found due claimants, order paid by owner previous to time of giving order to an assignee: See McCornick v. Sadler, 21 Utah 62, 60 Pac. Rep. 547.

[38] Hampton v. Christensen, 148 Cal. 729, 739, 84 Pac. Rep. 200. See Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 27 Pac. Rep. 743; Corbett v. Chambers, 109 Cal. 178, 41 Pac. Rep. 873; French v. Powell, 135 Cal. 640, 68 Pac. Rep. 92.

[39] **Kerr's Cyc. Code Civ. Proc.,** § 1200, approved March 18, 1885.

deducted the payments then due and actually paid, according to the terms of the contract and the provision of sections eleven hundred and eighty-three and eleven hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens." [40]

§ 527. **Same. Application of statutory provision.** The provisions of section twelve hundred [41] set forth in the last preceding section are applicable to valid statutory original contracts; [42] but, it seems, not to non-statutory original contracts,[43] nor to void statutory original contracts.[44]

In the case of a valid statutory original contract, the subclaimant's lien is limited by the contract price, and, under section twelve hundred,[45] such limitation remains, even if the contractor " shall fail to perform his contract in full, or shall abandon the same before completion." [46]

[40] **What constitutes abandonment** has been already considered: See "Abandonment," §§ 358 et seq., ante.

See § 520, ante.

Colorado. Subcontractors upon abandonment are entitled to lien for reasonable value to the extent of amount due contractor, less damages: Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129.

Oregon. Under act of 1874, where the contractor was entitled to an instalment, and the subclaimant served notice upon the owner, the latter was held entitled to a lien, notwithstanding the subsequent abandonment by the contractor: Whittier v. Blakely, 13 Oreg. 546, 11 Pac. Rep. 305. Materials upon ground not attached to building upon abandonment belong to the contractor: Savage v. Glenn, 10 Oreg. 440, 443.

Utah. But see Carey-Lombard L. Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572.

[41] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

[42] Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635.

See "Lien as Limited by Contract," §§ 315 et seq., §§ 452 et seq., ante, and § 540, post.

[43] Denison v. Burrell, 119 Cal. 180, 183, 51 Pac. Rep. 1 (although § 1200, **Kerr's Cyc. Code Civ. Proc.,** was not specifically referred to in this case; the contract was under one thousand dollars).

See "Definition," §§ 258 et seq., ante.

[44] Dunlop v. Kennedy, 102 Cal. 443, 444, 36 Pac. Rep. 765.

[45] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

[46] Willamette S. M. L. & M. Co. v. Los Angeles C. Co., 94 Cal. 229, 237, 29 Pac. Rep. 629.

See "Effect of Validity of Contract," §§ 284 et seq., ante; and "Notice," §§ 547 et seq., post.

Liability of owner, abandonment of valid contract: McDonald v. Hayes, 132 Cal. 400, 495, 64 Pac. Rep. 850. See Hampton v. Christensen, 148 Cal. 729, 735, 84 Pac. Rep. 200.

Where the owner completes the work, after the contractor's abandonment of a valid contract, at greater expense than the remainder of the contract price, the lien-holders are not entitled to liens for the full amount due them from the contractor, limited only by the full contract price, less payments made to the contractor, but the aggregate amount of their claims is limited by the rule established in section twelve hundred,[47] and they are entitled only to a pro rata share thereof.[48]

Where the liability of the owner is not established for the total amount of lien claims, under a valid contract, but to an amount for which the owner declares himself liable, or an amount fixed under section twelve hundred,[49] when the contract is abandoned, it seems that the validity of claims is a question for the consideration of the other lien claimants as between themselves.[50]

§ 528. **Same. Void contract abandoned.** In case of void statutory original contracts, the rule of law under the statute is different, and subclaimants have a lien, irrespective of the question of abandonment.[51]

§ 529. **Same. Non-statutory original contract.** In case of a non-statutory original contract, where the owner, without any notice of the claim of subclaimants, paid the contractor for the work already done under the contract, although the contractor was liable for damages to the owner for the unworkmanlike manner in which the work had been performed, it was held that no lien attached to the building in favor of the subcontractor, there being nothing due; and that if the contractor then abandoned the contract, the subclaimant was not "entitled to enforce a lien against the building, unless, after the owner has completed the building,

[47] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

[48] McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850.

Liability not beyond contract price: Southern Cal. L. Co. v. Jones, 133 Cal. 242, 244, 65 Pac. Rep. 378.

[49] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

[50] McDonald v. Hayes, 132 Cal. 490, 496, 64 Pac. Rep. 850.

[51] Willamette S. M. L. & M. Co. v. Los Angeles C. Co., 94 Cal. 229, 237, 29 Pac. Rep. 629.

See "Void Contract," §§ 319 et seq., post.

there remains a balance of the contract price, which may be applied to the satisfaction of such a claim." [52] And in case of a non-statutory original contract, subclaimants cannot have a lien for more than the amount due to the contractor when he abandons the contract, payment not having been intercepted by notice to the owner.[53]

[52] Wiggins v. Bridge, 70 Cal. 437, 439, 11 Pac. Rep. 754 (decided under the law before the amendment of § 1183, creating statutory original contracts, and before § 1200 and the provisions of § 1184 as to abandonment, were enacted); Walsh v. McMenomy, 74 Cal. 356, 359, 16 Pac. Rep. 17. See Kellogg v. Howes, 81 Cal. 170, 175, 22 Pac. Rep. 509, 6 L. R. A. 588.

See "Notice," §§ 547 et seq., post.

Oklahoma. Payment by owner under contract secured by bond: See American S. Co. v. Scott, 90 Pac. Rep. 7.

[53] O'Donnell v. Kramer, 65 Cal. 353, 4 Pac. Rep. 204 (before the enactment of § 1200, **Kerr's Cyc. Code Civ. Proc.**, supra). See Latson v. Nelson, 11 Pac. Coast L. J. 589; Kellogg v. Howes, 81 Cal. 170, 175, 22 Pac. Rep. 509, 6 L. R. A. 588; Walsh v. McMenomy, 74 Cal. 356, 359, 16 Pac. Rep. 17.

See "Liability," § 540, post, and "Notice," §§ 547 et seq., post.

In Denison v. Burrell, 119 Cal. 180, 182, 51 Pac. Rep. 1, the whole amount, $760, under a non-statutory original contract, was payable upon the "completion of the building and its acceptance by the owner." The contractor abandoned the building when it was half completed, and the owner finished the building for $84 less than the original contract price. The court said: "The contract being valid, it follows and is admitted that plaintiff's lien could not be for an amount greater than the sum in defendant's hands due and unpaid to the contractor under the contract at the time of abandonment. But, under the terms of this contract, there was nothing due the contractor until the completion of the building. The owner had an undoubted right to proceed with the construction, and to complete it, as he did, substantially as called for by the contract. So doing, the amount available for the liens of those who had furnished materials or labor to the contractor would be only the excess of the contract price remaining in the owner's hands after payment of the cost of completion. The case is, in principle, exactly what it would have been had the owner, before the filing of the lien, paid to the contractor all of the contract price excepting eighty-two dollars. In such a case, the contract being valid, no lien for a greater amount could be permitted." No reference was made to the provisions of § 1184, **Kerr's Cyc. Code Civ. Proc.**, quoted above.

In Blythe v. Poultney, 31 Cal. 233, 238 (1866), the contract was valid, and the final twenty-five per cent payable when the building was completed and accepted; notice was given the owner after payments in excess of the amount due the contractor; the owner completed the building for $1,447 less than the contract price, "and this ascertained, as the court below viewed the matter, the exact sum in which" the owners were indebted to the contractor "upon the contract when he violated it by abandoning performance of it on his part. This mode of adjusting parties' rights under contracts of the kind of that in question is not authorized by law, nor is it, in our judgment, just. . . . It may be they agreed to pay more than what they had contracted for was worth; or it may be they

§ 530. **Same. Destruction of building.** If the original contract for several buildings is entire, and the whole work, before completion, is destroyed by fire, without apparent fault of either party, payments due, under the contract, upon performance of certain conditions as to stage of completion of the work, cannot be recovered by the contractor, even where one of the structures has been completed to the designated stage.[54]

§ 531. **Same. Liability of fee for improvements by trespasser.** Where a building is constructed in a permanent manner upon land, it becomes a part thereof, but if it is constructed under contract with a person who falsely represents himself to be the owner of the land, claimants have a lien on the building, and it becomes a part of such land, subject to such lien. It would be inequitable to say that one, who may elect to treat a structure as a trespass and remove it, may elect to retain it, with knowledge that it is burdened with a lien, and yet hold it free from such burden. If the owner of the fee desires to avail himself of the benefit of such structure, he is required, in common honesty, to pay

procured the houses to be finished for less than the services and materials for that purpose were worth. The court cannot properly speculate in respect to the matter. It is enough to say, that, by the abandonment, Cook [the contractor] lost the right, which he would have had, to the full compensation agreed upon, had he fully performed the contract on his part. If Cook had sued Poultney and Smith [the owners] at the time this action was brought for the $1,447 which the court below finds to have been due him on the 12th of August, 1865 [when the contract was abandoned], he would not have been entitled to recover it, or any part of it, because no such sum was due him; and he did nothing thereafter to cause it to become due him; and if he was not entitled to recover it, Poultney and Smith's property could not be rendered liable for it: Dore v. Sellers, 27 Cal. 588, 595."

In Henley v. Wadsworth, 38 Cal. 356, 360 (1862), there was a notice to the owner after the abandonment of the contract by the contractor, and after he had been paid more than he was entitled to receive, and the owner completed the house at a greater expense than the original contract price; held, that the subclaimants had no lien: See Quale v. Moon, 48 Cal. 478, 481, 482.

[54] Clark v. Collier, 100 Cal. 256, 258, 34 Pac. Rep. 677.

See Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 2 Am. & Eng. Ann. Cas. 811, 81 Pac. Rep. 30, 106 Am. St. Rep. 75.

See § 16, and §§ 188 et seq., ante.

As to destruction of building before completed, and liability of land to lien, see note 2 Am. & Eng. Ann. Cas. 689.

liens thereon, created by its construction in good faith, without knowledge that the erection of the building was unauthorized, or he should not be allowed to retain it as a fixture to his land unencumbered.[55]

§ 532. Same. Application of payments by subclaimants. A subclaimant cannot legally apply any portion of the moneys paid by the owner to extinguish an obligation arising out of general dealings between himself and the contractor, unconnected with the contract under which he furnished the materials or labor; for, if this could be done, it would have the effect of subjecting the owner to the payment of other debts between the contractor and his employees, outside of his building contract.[56]

§ 533. Same. Payment of orders of contractor. Splitting demands. The owner is not required to pay orders given on him in amounts which he has not contracted to pay, nor for a demand of the contractor, split in favor of third persons.[57] But if the amount is owing, and he has agreed to pay them, he is obliged, generally, as against the contractor at least, to pay such orders in favor of lien-holders; for they operate as an assignment of the demand of the contractor, pro tanto, and if the owner refuses to pay the orders, he will not be

[55] Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.
See §§ 16, 188 et seq., and § 530, ante.

[56] Goss v. Strelitz, 54 Cal. 640, 645 (concurring opinion of McKee, J.).
See "Payments," §§ 251 et seq., ante.

Montana. Moneys paid by owner to his laborer may be apportioned by the latter to an account for which he has no lien, if it is not otherwise appropriated by the former: Christnot v. Montana G. & S. M. Co., 1 Mont. 44.

Nevada. Same principle as Montana case, supra: Capron v. Strout, 11 Nev. 304.

[57] Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394, **distinguishing** Adams v. Burbank, 103 Cal. 646, 37 Pac. Rep. 640. See Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Thomas v. Rock Island G. & S. M. Co., 54 Cal. 578; Kansas City, M. & B. R. Co. v. Robertson, 109 Ala. 296, 299, 19 So. Rep. 432; Belt v. Poppleton, 11 Oreg. 201, 203, 3 Pac. Rep. 27 (assignment of part of award).
See notes 57 Am. Dec. 441; 2 Am. St. Rep. 473; 21 Am. St. Rep. 716.

Distinguished in Noyes v. Barnard, 63 Fed. Rep. 788 (this was an action by a surviving partner to recover for work done by himself).

On acceptance or consent, rule is otherwise: See Welch v. Mayer, 4 Colo. App. 440, 36 Pac. Rep. 613; Little v. City of Portland, 26 Oreg. 235, 243, 37 Pac. Rep. 911.

permitted to recover from the contractor the costs incurred by reason of his refusal; nor to use the same as a basis for set-off.[58]

Under a contract to build a schoolhouse, whereby the contractor was to receive the balance due after paying all claims for materials, the contractor cannot complain of a judgment properly rendered against him in favor of material-men to whom he had given orders on the school trustees, who refused payment, merely because the amount is made by the judgment a lien and charge upon the unpaid moneys in the hands of the school district and its trustees, from which no appeal is taken by them.[59]

§ 534. **Same. Orders on owner's mortgagee. Destruction of building.** Where, from the terms of an order given to his material-man by a contractor upon a mortgagee, which was accepted, payable upon the completion of the building,

[58] Adams v. Burbank, 103 Cal. 646, 650, 37 Pac. Rep. 640. See Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394.

See "Costs," §§ 935 et seq., post.

Montana. A duty also rests on the owner, — that of paying the amount he agreed to pay for the work done, — and when he wrongfully refuses to pay the contractor, or to honor his orders for the payment of the workmen, thereby causing liens to be filed, or wrongfully contests the actions brought for the foreclosure of the liens, he cannot set off the costs thus caused by his own wrongful act against the claim of the contractor or his assignee. Whether it was the duty of the defendants, as a matter of law, to honor these orders, is immaterial. The orders served to give them notice of these outstanding claims against their property. They were also an acknowledgment by the contractor that the amounts were correct. The danger of paying spurious claims or of making volunteer payment was thus avoided. Their payment would have been a proper charge or counterclaim against the contractor, and a proper set-off against the demand of his assignee. The inhibition against "splitting demands" does not apply. The law splits the demand when it authorizes the workman to file a lien for the amount due him, irrespective of whether or not this amount corresponds with the original contract price. If the owner chooses, at his own instance, to contest these labor claims after they are acknowledged by the party personally liable, and is defeated, he cannot set off the cost of his own contest against the demand of the contractor: Boucher v. Powers, 29 Mont. 342, 74 Pac. Rep. 942.

School district cannot maintain action in equity against assignee of an order to cancel the order and enjoin its payment on account of increased expense or non-payment of claims, caused by a breach of the contract, where the contractor has given a bond, there being an adequate remedy upon the bond: Long Beach S. Dist. v. Lutge, 129 Cal. 409, 415, 62 Pac. Rep. 36.

[59] Simpson v. Gamache, 134 Cal. 216, 219, 66 Pac. Rep. 222.

and from the acceptance of the order and the circumstances surrounding the acceptance it is apparent that the intention of the parties was, that the mortgagee should retain for the material-men, out of moneys in its hands belonging to the owner of the building, and due from him to the contractor, enough to pay the amount of the contractor's indebtedness to the material-men, evidenced by an order, there being no existing indebtedness on the part of the mortgagee, and it having no money or property of the contractor, but it simply having a mortgage on the owner's property to secure legal advances for the owner on account of the building, it can legally advance for the owner to the contractor only such moneys as may be due from such owner to the contractor on account of the building, and even if it has other moneys and securities in its hands belonging to the owner of the building, such moneys and securities are the property of the owner, and cannot legally be applied in payment of the contractor's debts, in the absence of any liability on the part of the owner to the contractor, or some authorization from such owner to so apply them. If the contractor fails to complete the building, the amounts stipulated by the building contract to be paid upon such completion never have become due from the owner to the contractor, notwithstanding a destruction of the building by fire, without the contractor's fault, and therefore there is no money in the mortgagee's hands applicable to the contractor's debt to the material-men.[60]

§ 535. **Same. Voluntary payment of contractor's debts.** The owner is generally not under obligation to the contractor to pay his debts to the material-men without suit, or to anticipate that the contractor will have no defense against them in a suit brought by them to enforce and foreclose their liens. He cannot be presumed to know whether or not the contractor has any valid defense to the foreclosure suits. If

[60] Hogan v. Globe M. B. & L. Assoc., 140 Cal. 610, 613, 74 Pac. Rep. 153.

Advances must be properly made: See 4 Am. & Eng. Ann. Cas. 615.

As to destruction of building before completion, and its effect on mechanics' liens, see note 2 Am. & Eng. Ann. Cas. 689.

the owner pays the demands, on which the material-men had filed liens, without suit, and without the request of the contractor, the owner does so at the peril of being adjudged to have paid them as a mere volunteer to the extent to which the demands paid may not prove to be valid liens upon his property, and to this extent he will have no recourse upon the contractor for indemnity.[61]

The burden of proving that the demands paid by him were valid debts of the plaintiff secured by valid liens upon defendant's property, or that he had paid thereon, at the contractor's request, would, moreover, be imposed upon him. He is under no obligation to the contractor to pay the contractor's debts to the material-men.[62]

[61] Substantially in the language of Covell v. Washburn, 91 Cal. 560, 563, 27 Pac. Rep. 859; Wilson v. Samuels, 100 Cal. 514, 519, 35 Pac. Rep. 148.

Owner has no right to set up his opinion as to the legality of lien when he knows that the contractor or his assignees claimed the right to contest, without taking a chance of the correctness of that opinion: Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. Rep. 1008.

Owner at his own risk pays subclaimants, for he thus determines the amount and justness of their claims: Stimson v. Dunham, C., H. Co., 146 Cal. 281, 283, 79 Pac. Rep. 968.

Owner is not liable to contractor, if, after an order of the contractor to pay subclaimants, the owner voluntarily pays a valid judgment against the contractor in favor of such claimants: Simpson v. Gamache, 134 Cal. 216, 66 Pac. Rep. 222.

See § 522, ante.

Surety on contractor's bond. Liability for attorneys' fees, etc. In Alcatraz M. H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 85 Pac. Rep. 156, 158, it was held that a surety on a contractor's bond was not liable for expenses incurred by the owner for the services of attorneys and other expenses in suits for the enforcement of liens, where, under the contract, he was not required to pay twenty-five per cent of the contract price until thirty-five days after the completion of the building, during which time he could ascertain the lien claimants and pay them the sum unpaid, on the theory that the owner knew or could have ascertained the amount of liens claimed thereon, and that he knew, too, that the amount of the unpaid portion of the contract price was the limit for which any liens could be enforced, and where, instead of appropriating the money, the owner chose to await action for their recovery, and thereby incurred additional expense, the surety was not liable for such expense, but, as above shown, no such obligation rests upon the owner.

Colorado. See Mouat L. Co. v. Gilpin, 4 Colo. App. 534, 537, 36 Pac. Rep. 892.

[62] Covell v. Washburn, 91 Cal. 560, 563, 27 Pac. Rep. 859; Wilson v. Samuels, 100 Cal. 514, 519, 35 Pac. Rep. 148. See Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449.

Colorado. See Schradsky v. Dunklee, 9 Colo. App. 394, 397, 48 Pac. Rep. 666.

His only obligation to the contractor is to pay him so much as the labor he has performed and the materials he has furnished and used on his house are reasonably worth. Against this obligation he is entitled to set off the contractor's obligation to indemnify him for all that he has been compelled to pay to relieve his property from the liens thereon to secure the contractor's debts, including costs in the suits to enforce these liens.[62]

Failure to make valid defense. Where the original contract is valid, and the owner does not set up a valid defense upon the foreclosure of subclaimants' liens for a larger amount than that due under the contract to the contractor, and pays the judgment therefor, under stipulation, as he is under no legal obligation to pay the excess, which is merely a debt of the contractor, he cannot recover such voluntary payment of the excess from the contractor's surety, especially where the contractor has not requested the owner to pay it, where the bond does not extend to the releasing of the building from invalid liens, but covers only claims that may "accrue" against the building by reason of the erection; for claims which could not be legally enforced against the building cannot be said to have accrued against it.[63]

§ 536. **Same. Guaranty not a prohibited payment.** Where the owner, at the request of the contractor, guarantees or assumes the latter's accounts with his subclaimants, for the material necessary for completion of the structure, the amount to be deducted from the completion payment when it becomes due to the contractor, and the owner pays the amount after such payment becomes due, the guaranty is not equivalent to a premature payment denounced by section eleven hundred and eighty-four,[64] as against general credi-

[62] Covell v. Washburn, 91 Cal. 560, 563, 27 Pac. Rep. 859; Wilson v. Samuels, 100 Cal. 514, 519, 35 Pac. Rep. 148. See Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449.

Colorado. See Schradsky v. Dunklee, 9 Colo. App. 394, 397, 48 Pac. Rep. 666.

[63] Brill v. De Turk, 130 Cal. 241, 244, 62 Pac. Rep. 462.

Approved in Stimson v. Dunham, C., H. Co., 146 Cal. 280, 284, 79 Pac. Rep. 968.

[64] **Kerr's Cyc. Code Civ. Proc., § 1184.**

tors, or those who had no lien upon the property, by filing a claim therefor, or who had given no notice to withhold payments.[65]

§ 537. **Same. Owner as stakeholder.** After the completion of a valid contract, the owner holds the reserved money for payment to the contractor and lien claimants, as the one or the other may prove to be entitled to it. If there be a contest between them in regard to the money, it is a matter for them to settle between themselves, and at their own expense, with which the owner has no concern. In such a case the owner may, and should, deposit the money in court and allow the contestants then to have their rights determined. Where there is no contract between the contractor and the lienholders, and the former, by his default, admits that the latter

[65] **In Hampton v. Christensen,** 148 Cal. 729, 734, 84 Pac. Rep. 200, the court say: "In return for the contractor's promise to reimburse him out of the completion payment when it became due, he guaranteed or assumed the contractor's responsibility for the payment of certain material necessary for the completion of his house. When the completion payment became due (no rights by way of liens or notice to withhold having intervened), he would have been at perfect liberty to pay this money to the contractor. Indeed, no one will dispute but that, still holding the money, he could have gone with the contractor and paid it over himself to the material-men, thus to make sure that the obligations were canceled. Or, again, no one would question his right to have paid over the money to the contractor, and immediately to have received back from him the amount of these obligations. But, because he did not adopt one of these roundabout ways of accomplishing the same result, but, instead, himself paid the amount of the funds due the contractor and deducted the amount so paid, it is contended that, having done this, in contemplation of his obligations previously assumed, he must pay the money twice. This, instead of being a construction of a penal statute in favor of the owner, is a tightly stretched and extremely attenuated construction against him. If, before he actually made these payments out of this fund after it became due, demands to withhold and claims of liens aggregating two thousand dollars had been served and filed, he then, in the eye of the law, would have stood compelled to sequester this money and hold it to meet these demands, and thus might have been obliged, under his guaranty or obligation, to pay out of his own pocket the amounts which he had assumed on behalf of the contractor. That was the only risk which he ran; but as in this case a demand amounting to only five hundred dollars had been served upon him, there was still fifteen hundred dollars to be devoted to the extinguishment of these obligations. Finally, upon this point it may be said that, as this penal clause of the statute is to be construed in favor of the owner, the question may be taken as determined in the owner's favor under the finding of the court that the payments were actually made after the completion payment was due."

are entitled to it, the owner should not protract the litigation.[66]

§ 538. **Same. Liability for costs and interest. Interpleader.** Where, by force of the statute, the owner is prevented from paying the amount for which he was liable to the contractor, after the service of notices of lien claimants on the owner, the latter is not liable for interest;[67] and a demand for extras does not draw interest until the amount is ascertained by the judgment of the court; but where he contests the right of the contractor and his subclaimants to the fund, he may be held liable for costs.[68]

Where notices are served to an amount in excess of the contract price, the owner cannot be held beyond the contract price, when the contract is valid, and charged with additional costs, created or incurred by the contractor.[69]

Owner may come into court and bring in all interested parties, so that one decree may settle all rights, and may ask to be permitted to pay into court the amount due by him as

[66] De Camp L. Co. v. Tolhurst, 99 Cal. 631, 635, 34 Pac. Rep. 438. See "Decree," § 911, post.

Oregon. Duty of owner before expiration of thirty days after completion of building to see to it that payments to contractors were distributed among sublien claimants: Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 97, 75 Am. St. Rep. 574 (under Hill's Code, §§ 3678, 3679).

Deposit with county clerk under act of 1874 optional: Whittier v. Blakely, 13 Oreg. 546, 11 Pac. Rep. 305.

[67] Stimson v. Dunham, C., H. Co., 146 Cal. 281, 283, 79 Pac. Rep. 968. See Easterbrook v. Farquharson, 110 Cal. 316, 42 Pac. Rep. 811.

[68] **Contest by owner. Costs and attorneys' fees.** "At the commencement of the action, he [the owner] could have tendered and paid into court the amount then unpaid of his liability to the contractor, and thereby discharged himself of further liability; but, instead thereof, he contested the right, not only of the lien claimants, but also of the contractor, to any portion of said unpaid amount, and necessitated the litigation which followed. The court, therefore, did not err in requiring the payment of the costs and attorneys' fees in addition to the amount which he had agreed to pay the contractor": Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1081.

Colorado. Allowance of interest on claims: See Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 423.

Montana. It has been held in this jurisdiction that where the contractor gives to his subclaimants orders on the owner, which the latter declines to pay until liens based upon the claims are merged in a judgment, the costs of the foreclosure of the liens cannot be set off by him in an action by the contractor to assert a lien for the contract price: Boucher v. Powers, 29 Mont. 342, 74 Pac. Rep. 942.

[69] Stimson v. Dunham, C., H. Co., 146 Cal. 281, 283, 79 Pac. Rep. 968.

soon as the sum due for extras could be ascertained, where no objection to such payment is raised.[70]

Where no tender of amount due, or offer to allow judgment for any sum, is made by the owner, costs and attorneys' fees, provided for in section eleven hundred and ninety-five,[71] may be allowed to the party establishing his lien.[72]

§ 539. **Same. Personal liability.** The "employer," whether the owner of the land or not, is liable for the full value of the labor or materials to the person with whom he contracts;[73]

[70] Stimson v. Dunham, C., H. Co., 146 Cal. 281, 283, 79 Pac. Rep. 968.

Payment into court. Interest and costs. Under a valid contract, where the owner pays the fund into court, he is not liable for interest or costs, although an issue is made as to the validity of the contract, which was decided in favor of the owner: Hooper v. Fletcher, 145 Cal. 375, 379, 79 Pac. Rep. 418.

Duty to deposit money in court: Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. Rep. 1008.

[71] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

[72] Linck v. Johnson, 134 Cal. xix, 66 Pac. Rep. 674.

[73] Central L. & M. Co. v. Center, 107 Cal. 193, 197, 40 Pac. Rep. 334.

See, for instance, Kuhlman v. Burns, 117 Cal. 469, 49 Pac. Rep. 585.

See **Kerr's Cyc. Code Civ. Proc.,** § 1197.

Creditors, who are not found to be lien-holders, have no recourse against the owner's property, nor a personal judgment against him, unless they are in privity with him: Kennedy-Shaw L. Co. v. Priet, 115 Cal. 98, 99, 46 Pac. Rep. 903. See s. c. 113 Cal. 291, 293, 45 Pac. Rep. 336; Kennedy-Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008; Santa Clara V. M. & L. Co. v. Williams (Cal., Dec. 8, 1892), 31 Pac. Rep. 1128.

See §§ 315 et seq., ante.

Liability of board of education for breach of contract: See Morgan v. Board of Education, 136 Cal. 245, 246, 68 Pac. Rep. 703.

Liability of owner on contract to pay for work in instalments, upon failing to pay one instalment, whole contract price not due: See Flinn v. Mowry, 131 Cal. 481, 486, 63 Pac. Rep. 724, 1006.

Colorado. Where the owner agrees also to pay the claims of the contractor's subclaimants if materials or labor are performed upon or for the building, the owner is personally liable: Harris v. Harris, 18 Colo. App. 34, 69 Pac. Rep. 309.

Personal judgment against the owner for work performed upon building, under owner's promise to pay the claimant therefor, is not affected by the failure of the court to make a final disposition of the case against the contractor, who is also a defendant: Harris v. Harris, 18 Colo. App. 34, 69 Pac. Rep. 309.

Oregon. Where the defendant is a party to the contract, the claimant may have personal judgment for any deficiency, notwithstanding recitals in the judgment of the amounts found to be due: Watson v. Noonday M. Co., 37 Oreg. 287, 55 Pac. Rep. 867, 58 Id. 36, 60 Id. 994 (under Hill's Ann. Laws, § 3669).

Wyoming. Personal liability to owner's contractor: Wyman v. Quayle, 9 Wyo. 326, 63 Pac. Rep. 988.

but, since there is no privity between him and subclaimants,[74] aside from his liability by notice,[75] he is not personally liable for the debts of the contractor to them, even if they have liens upon the property, whether the original contract is valid [76] or void.[77]

The statute does not create a contractual relation, nor attempt to create one, which does not otherwise exist between the owner and the subcontractor, upon which a personal

[74] Bowen v. Aubrey, 22 Cal. 566, 572; Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449.

Owner not personally liable: See Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 81 Pac. Rep. 30, 106 Am. St. Rep. 75, 2 Am. & Eng. Ann. Cas. 811.

See §§ 315 et seq., ante.

Colorado. Estey v. Halleck & H. L. Co., 4 Colo. App. 165, 34 Pac. Rep. 1114; Sayre-Newton L. Co. v. Park, 4 Colo. App. 482, 485, 36 Pac. Rep. 445 (1889).

[75] See § 547, post.

Colorado. The lien attaches only by virtue of the work being done or materials furnished under a contract, express or implied, with the owner of the property upon which the lien is claimed, and the burden of proving such contract rests upon the party asserting it: Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 48 L. R. A. 340, 83 Am. St. Rep. 49.

Hawaii. Owner, personally, not liable to subclaimants: Allen v. Reist, 16 Hawn. 23.

Montana. Owner, personally, not liable to subclaimants: Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054, 1055.

New Mexico. See Pearce v. Albright, 76 Pac. Rep. 286.

[76] Adams v. Burbank, 103 Cal. 646, 650, 37 Pac. Rep. 640; Gibson v. Wheeler, 110 Cal. 243, 246, 42 Pac. Rep. 810. See Van Winkle v. Stow, 23 Cal. 458, 459; Barber v. Reynolds, 44 Cal. 519, 537 (1862); Eaton v. Rocca, 75 Cal. 93, 97, 16 Pac. Rep. 529; Kennedy-Shaw L. Co. v. Priet, 115 Cal. 98, 99, 46 Pac. Rep. 903; Kennedy-Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008; Merced L. Co. v. Bruschi (contractor's material-man), (Cal. Sup., Nov. 29, 1907).

Colorado. Lowrey v. Svard, 8 Colo. App. 357, 46 Pac. Rep. 619.

[77] Covell v. Washburn, 91 Cal. 560, 562, 27 Pac. Rep. 859 (nor upon an implied contract); Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 627, 16 Pac. Rep. 516; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860; Santa Clara V. M. & L. Co. v. Williams (Cal., Dec. 8, 1892), 31 Pac. Rep. 1128; McMenomy v. White, 115 Cal. 339, 343, 47 Pac. Rep. 109; Gnekow v. Confer (Cal.), 48 Pac. Rep. 331; Marchant v. Hayes, 120 Cal. 137, 139, 52 Pac. Rep. 154. See Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072; Kellogg v. Howes, 81 Cal. 170, 181, 22 Pac. Rep. 509, 6 L. R. A. 588 (concurring opinion); Wood v. Oakland & B. R. T. Co., 107 Cal. 500, 502, 40 Pac. Rep. 806; Skym v. Weske Consol. Co. (Cal., Dec. 18, 1896), 47 Pac. Rep. 116. See §§ 543 et seq., post.

Colorado. Liability of owner for value of materials furnished, for failure to record contract, as required by statute (Laws 1893, ch. cxvii, p. 315, §§ 1, 2): See Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789.

action will lie. "When the law, in the contingencies mentioned in section eleven hundred and eighty-three,[78] deems that the labor is performed and material furnished 'at the personal instance of the owner,' it is simply for the purposes of the liens which it is the object of the statute to afford to those who perform labor or furnish material for the construction of buildings. To accomplish this object, the statute creates, under the circumstances, by its own force and vigor, such a relation for a specific purpose — viz., to uphold a lien — as will effectuate that purpose."[79]

Expulsion of contractor. The owner is not personally liable to subclaimants when he expels the contractor and wrongfully takes the materials purchased by the contractor to complete the contract, although he may be liable to the contractor for damages in conversion.[80]

Agency. When the person who contracts with the owner's claimant is not the agent of the owner, either express or ostensible, the owner is not personally liable.[81] And, in the absence of privity or estoppel, equitable or statutory, as heretofore shown, the owner's property is not subject to a lien.[82]

§ 540. **Same. Liability of owner or employer under valid contract.** This subject has been considered from other points of view elsewhere.[83] It remains to recapitulate briefly the general principles of the owner's liability under a valid con-

[78] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[79] Gnekow v. Confer (Cal., March 31, 1897), 48 Pac. Rep. 331 (void contract).

See "General Nature of Lien," § 9, ante.

[80] Turner v. Strenzel, 70 Cal. 28, 31, 11 Pac. Rep. 389. The question of the owner's estoppel was raised in this case. An attempt was made to enforce a lien, but the complaint failed to show that anything was due from the owner to the contractor.

[81] Eaton v. Rocca, 75 Cal. 93, 97, 16 Pac. Rep. 529.

See "Agency," §§ 572 et seq., post.

[82] Johnson v. Dewey, 36 Cal. 623, 625. So of a lien created by a lessee in possession: Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 338.

See also § 547, post.

[83] See "Effect of Validity of Contract," §§ 315 et seq., ante; "Lien as Limited by Contract," §§ 452 et seq., ante; "Liability of Public Corporation," §§ 116, 192, ante; "Notice of Non-liability," §§ 469 et seq., ante; "Costs," §§ 935 et seq., post; "Substantial Non-Compliance as to Payments," §§ 269 et seq., ante.

tract. Under the code,[84] the rights of lien-holders and the liability of the owner are, in general, determined and controlled by the terms of the valid original contract between the owner and the original contractor; and the legislature cannot compel the owner to pay more than he has contracted to pay under such valid contract,[85] unless he has paid the same after being notified of the claims of the contractor's subclaimants before payment to the contractor,[86] as more particularly shown in other parts of this work.[87] And, generally speaking, in the absence of notice from the subcontractor of his claim, the payment by the owner in conformity

[84] Dingley v. Greene, 54 Cal. 333, 336; Kellogg v. Howes, 81 Cal. 170, 175, 22 Pac. Rep. 509, 6 L. R. A. 588; Johnson v. La Grave, 102 Cal. 324, 325, 36 Pac. Rep. 651; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758.

Likewise under previous statutes. Act of 1858: McAlpin v. Duncan, 16 Cal. 126, 128; Bowen v. Aubrey, 22 Cal. 566, 570. Act of 1862: Shaver v. Murdock, 36 Cal. 293, 298; Henley v. Wadsworth, 38 Cal. 356, 361.

[85] Whittier v. Wilbur, 48 Cal. 175, 177; Kellogg v. Howes, 81 Cal. 170, 177, 22 Pac. Rep. 509, 6 L. R. A. 588. See Wilson v. Barnard, 67 Cal. 422, 423, 7 Pac. Rep. 845. See Gibbs v. Tally, 133 Cal. 373, 378, 65 Pac. Rep. 970, 60 L. R. A. 815.

See §§ 34 et seq., ante.

Abandonment: See McDonald v. Hayes, 132 Cal. 490, 494, 64 Pac. Rep. 850.

See §§ 358 et seq., ante.

Hawaii. The owner may protect himself from liability beyond the contract price by employing only such contractors as are financially responsible, or by withholding from them such part of the contract price as may be sufficient to satisfy liens, or by requiring them to give bonds for the delivery of the property free from liens, or by other means: Allen v. Redward, 10 Hawn. 151, 157.

[86] Kellogg v. Howes, 81 Cal. 170, 175, 177, 22 Pac. Rep. 509, 6 L. R. A. 588.

Subclaimants cannot acquire any rights against the owner in violation of the terms of the original valid contract: Walsh v. McMenomy, 74 Cal. 356, 359, 16 Pac. Rep. 17; Bowen v. Aubrey, 22 Cal. 566, 568.

See § 315, ante.

Colorado. The right of the material-man to maintain a lien against the property depends entirely upon a contract, express or implied, with the owner of the realty, or an agreement between the owner and a contractor, under whom he can show a derivative right: Groth v. Stahl, 3 Colo. App. 8, 30 Pac. Rep. 1051 (1889).

Nevada. Contra: See Lonkey v. Cook, 15 Nev. 58; Hunter v. Truckee Lodge, 14 Nev. 24 (1875).

See §§ 452 et seq., ante.

Utah. See Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784; Morrison v. Inter-Mountain S. Co., 14 Utah 201, 46 Pac. Rep. 1104.

[87] See §§ 547 et seq., post.

to the contract will relieve him, to the extent of such payment, from any claim or lien of the subcontractor.[88]

Unless the notice prescribed by statute [89] is given in time to intercept moneys in the hands of the owner, or a claim of lien is duly filed, payment to the contractor in accordance with the terms of a non-statutory original contract will operate as a complete discharge, so far as the owner is concerned.[90]

Portion not due until building completed. When a contract is made by the owner for the construction of a building, by the terms of which a portion of the contract price is not due until after the building is completed, and when materials have been furnished for and used in the construction, presumably in view of such contract, and when, thereafter, and with notice thereof, the owner pays his contractor before the building is completed, and before the money is due, he is liable to subclaimants to the extent of the money thus prematurely paid. To hold otherwise would be to enable the owner to practise a fraud, and the contract, instead of being a chart for the direction of subclaimants, would become a delusion and a fraud.[91]

§ 541. Same. Payment to subclaimants. Valid contract. Last payment. In the case of a statutory original contract, it was not intended that lien claimants should be compelled to rely on the good faith and honesty of the owner or contractor in devoting the last payment of twenty-five per cent to the payment of their claims, but that they should have the security afforded by a lien on the property until the claims

[88] Kellogg v. Howes, 81 Cal. 170, 175, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589.

See "Notice," §§ 547 et seq., post.

[89] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[90] Kerckhoff-Cuzner M. & L. Co. v. Cummings, 86 Cal. 22, 24 Pac. Rep. 814.

Utah. See Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[91] Walsh v. McMenomy, 74 Cal. 356, 359, 16 Pac. Rep. 17. See Valley L. Co. v. Struck, 146 Cal. 266, 80 Pac. Rep. 405.

Oregon. Liability of owner for payments made by him, unless distributed among persons entitled to a lien, under Hill's Ann. Laws, § 3678: See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996.

were paid; and there is nothing in the statute to the effect that the owner shall be exonerated from the effect of his violation of the statute upon showing that he has paid out the entire contract price, pro rata, to the claimants of liens.[92]

§ 542. Same. Liability of owner under void contract. This subject has already been developed at some length,[93] and will be here briefly recapitulated. In reference to the provision,[94] making statutory original contracts void for failure to comply with the provisions of the section of the statute, the court has said: "'No recovery shall be had thereon by either party.' In our judgment, this provision of the statute takes away entirely the basis upon which it was held, under earlier statutes, that a subcontractor could not recover, viz., that the owner could not be held to pay more than he had contracted to pay, or in other words, could not be compelled to pay twice for the same thing. This cannot be so under the present statute, where his contract is not recorded [filed]. The contract cannot be the measure of his liability, because there is no contract." The legislature, though it cannot compel the owner to pay more than he has contracted to pay, where the contract is valid, unless notified of the claims of subcontractors before payment to the contractor, yet has power to require a record of the contract as the condition of its validity, and to forbid any payments to the contractor as against the material-men and laborers, unless the contract is recorded.[95] "If the legislature had the power to say to the owner, If you pay the contractor after notice from the

[92] Merced L. Co. v. Bruschi (Cal. Sup., Nov. 29, 1907), 92 Pac. Rep. 844.

[93] See, generally, §§ 319 et seq., ante; "Notice," §§ 547 et seq., post; "Cumulative Remedies," §§ 638 et seq., post.

Ultra vires. Board of education: See Morgan v. Board of Education, 136 Cal. 245, 247, 68 Pac. Rep. 703. See Brown v. Board of Education, 103 Cal. 534, 37 Pac. Rep. 503.

[94] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[95] Kellogg v. Howes, 81 Cal. 170, 176, 22 Pac. Rep. 509, 6 L. R. A. 588.

The act of 1862 did not make the original contract void for want of record, but the penalty was the subordination of the lien of the original contract.

In further explanation of text, see §§ 319 et seq., ante.

subcontractor of his claim, you shall still be liable to the latter, it has the undoubted right to say to him, If you do not execute your contract in a certain form, and file it in the recorder's office, you shall be liable to material-men and laborers for the value of their material and labor. There is no hardship or injustice in this provision. The owner is only compelled to pay once for what he receives and retains the benefit of. He is not bound and has no right, as between him and subcontractors, to pay the contractor." [96]

§ 543. Same. Void contract. Penal provision. The provision of section eleven hundred and eighty-three,[97] avoiding the original contract under certain circumstances, is, however, highly penal in its character, a violation of its mandates subjecting the owner to a liability for debts which he never agreed to pay, and for which he receives no benefit. A statute which provides for making one person liable for the debts of another, and prescribes how and under what circumstances he shall be held thus liable, is penal in its character, and statutes creating a forfeiture and imposing a penalty ought to be strictly construed against the liability. Some doubt has been expressed whether this rule of construction, which obtained before the codes were adopted, is to be given its full force under the provisions of the code. But, however this may be, it is conceded that such statutes should not receive a construction unduly favoring the imposition of a penalty or forfeiture; and the rules governing such cases have been already stated. In the case of a statute which deals with the constitutional right of an owner of property to make contracts relating to its use and enjoyment, the restriction of the right can go only to the form of the contract, and cannot be extended by construction beyond what is expressed.[98]

[96] Kellogg v. Howes, 81 Cal. 170, 177, 22 Pac. Rep. 509, 6 L. R. A. 588.
[97] **Kerr's Cyc. Code Civ. Proc.**, § 1183.
[98] Snell v. Bradbury, 139 Cal. 379, 381. 382, 73 Pac. Rep. 150.
See, generally, on this subject, Irvine v. McKeon, 23 Cal. 472, 474; Trumpler v. Bemerly, 39 Cal. 490; Ex parte Gutierrez, 45 Cal. 429; People v. Soto, 49 Cal. 67; Moore v. Lent, 81 Cal. 502, 506, 22 Pac. Rep. 875; Stimson M. Co. v. Braun, 136 Cal. 122, 125, 68 Pac. Rep. 481, 89 Am. St. Rep. 116, 57 L. R. A. 726.

§ 544. Same. Statute measure of liability under void contract. Notice by subclaimants of an unfiled statutory original contract, which is therefore void, cannot affect their rights, the question not being one of notice, but of the validity of the contract; nor are their liens subordinate to the provisions of such void contract; for in such case the statute, and not the contract, measures the extent of the owner's liability.[99]

§ 545. Same. Personal liability to subclaimants under void contract. Notwithstanding the fact that section eleven hundred and eighty-three [100] states that the statutory original contract shall be void for failure of record, etc., and that in such case the labor done and materials furnished are deemed to have been done and furnished at the instance of the owner, and a lien is given to subclaimants for the value thereof, the owner is not personally liable therefor, in the absence of notice in the nature of a garnishment,[101] the only remedy against him in such case being for the foreclosure of liens.[102]

[99] Kellogg v. Howes, 81 Cal. 170, 178, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589; Butterworth v. Levy, 104 Cal. 506, 510, 38 Pac. Rep. 897; Willamette S. M. L. & M. Co. v. Los Angeles C. Co., 94 Cal. 229, 236, 240, 29 Pac. Rep. 629. See Giant P. Co. v. San Diego F. Co., 97 Cal. 263, 266, 32 Pac. Rep. 172.

See "Contract," §§ 319 et seq., ante.

[100] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[101] See "Notice," §§ 547 et seq., post.

[102] Hubbard v. Lee (Cal. App., Oct. 11, 1907), 92 Pac. Rep. 744; McMenomy v. White, 115 Cal. 339, 47 Pac. Rep. 109; Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 627, 16 Pac. Rep 516; Santa Clara V. M. & L. Co. v. Williams (Cal., Dec. 8, 1892), 31 Pac. Rep. 1128; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 645, 22 Pac. Rep. 860; Kellogg v. Howes, 81 Cal. 170, 177, 22 Pac. Rep. 509, 6 L. R. A. 588; Giant P. Co. v. San Diego F. Co., 97 Cal. 263, 266, 32 Pac. Rep. 172; Madera F. & T. Co. v. Kendall, 120 Cal. 182, 184, 52 Pac. Rep. 304, 65 Am. St. Rep. 177; Marchant v. Hayes, 120 Cal. 137, 139, 52 Pac. Rep. 154; Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449, 126 Cal. 9, 14, 58 Pac. Rep. 312.

According to Kellogg v. Howes, 81 Cal. 170, 178, 22 Pac. Rep. 509, 6 L. R. A. 588, it was held in Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 20 Pac. Rep. 419, "that the contract between the subcontractor and contractor for materials was valid, notwithstanding the original contract was void as between the parties to it. But the opinion in the case was so worded as to mislead in this respect, and it broadly stated that the contract, though wholly void, was not void, except as to the parties to it. . . . The court meant nothing more in that case than to hold that the material-man was entitled to a lien, notwithstanding the contract was not filed in the recorder's office. What was said as to the contract remaining to mark the extent of the recovery of the lien-holders, etc., was outside of the real question

And the same rule applies to the person who caused the structure to be erected, although he was not the "owner," if he is not in privity with the claimant.[103]

§ 546. Same. False representations by owner as to completion of building. Where the owner does not file a notice of completion, and by his declarations intentionally misleads a claimant to believe that the building is not completed, and the claimant acts upon such belief, and then fails to file his claim within the statutory time after the actual completion, by reason thereof, the owner will be estopped to falsify such declaration; but such estoppel is not the basis of the claimant's cause of action.[104]

presented in the case, and should be modified. The extent of the material-man's recovery is not measured by the terms of the contract. On the contrary, the statute provides, in express terms, that, where the contract is not so recorded, the material-man shall have a lien for the value thereof": Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 644, 22 Pac. Rep. 860.

Colorado. Purchaser of property, after delivery of materials, not personally liable: See Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83, 85.

[103] Marchant v. Hayes, 120 Cal. 137, 139, 52 Pac. Rep. 154.

[104] Hubbard v. Lee (Cal. App., Oct. 11, 1907), 92 Pac. Rep. 744.

CHAPTER XXVII.

OWNER, EMPLOYER, OR PERSON CAUSING IMPROVEMENT TO BE MADE (CONTINUED). LIABILITY AS FIXED BY NOTICE.

§ 547. Scope of discussion.
§ 548. Notice to owner or employer. History.
§ 549. Statutory provision.
§ 550. Notice to owner, and claim of lien. Distinction and purposes.
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§ 567. Action on notice.
§ 568. Form and contents of notice. Construction.
§ 569. Same. Effect of several notices served.
§ 570. Same. Statutory requirements of notice.
§ 571. Same. Sufficiency of notice.

§ 547. Scope of discussion. In this chapter we shall consider the notice to be served upon the owner under section eleven hundred and eighty-four,[1] its effect, and its requirements. The general differences in form and purpose of the notice here discussed from those of the claim of lien to be filed with the recorder have already been pointed out at some length,[2] and reference should be made to other parts of this work for further discussion of the subject.

[1] **Kerr's Cyc. Code Civ. Proc.**, § 1184.
[2] See "Claim," §§ 361 et seq., ante.

§ 548. **Notice to owner or employer.**[3] **History.** In construing the word "owner," as used in the statute requiring the name of the "owner" to be inserted in the claim of lien, the supreme court has said: "The act of 1850[4] . . . required the claimant to give notice in writing to the 'owner' of the building on which his labor or materials had been expended. By the act of 1855[5] . . . the claimant was required to file his claim in the recorder's office, and within five days thereafter serve a copy thereof on the owner of the building, or his agent in case the owner resided out of the county, and if he had no agent, to post it on the building charged with the lien. In 1858[6] . . . this act was amended by authorizing the copy of the notice to be left at the residence of the owner, or deposited in the post-office, directed to him, instead of being posted upon the building. In the act of 1862[7] . . . the claimant was required to give a notice of the nature and extent of his claim to the 'employer' of the original contractor. The statute was again revised in 1868, and the act of that year[8] . . . contains substantially the present provisions of the code on this subject. Instead of requiring the notice to be given to the 'employer' of the original contractor, as was required by the act of 1862, this act brings the 'owner' into connection with the claimant, as did the statutes prior to 1862, and, instead of requiring that the notice of claim be personally served upon him, authorizes it to be filed for record with the county recorder. By the act of 1862, the notice was to be given to the 'employer' of the original contractor, irrespective of any interest that he might then have

[3] See, generally, Stimson v. Dunham, 146 Cal. 281, 283, 79 Pac. Rep. 968; Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. Rep. 442.

Excessive claim in notice of claim to owner of lien for materials furnished to the contractor, held not to preclude a recovery of the amount actually due, where the claim was made in good faith: Strandell v. Moran (Wash., June 2, 1908), 95 Pac. Rep. 1106.

Sufficient signature to notice. Where claimant was doing business as "A. S., agent," a signature to a claim was simply, "A. S.": held to be a sufficient signature, in an action on contractor's bond to recover for materials furnished in repairing sidewalks: Id.

[4] Stats. 1850, p. 212, § 2.

[5] Stats. 1855, p. 157, § 3.

[6] Stats. 1858, p. 225.

[7] Stats. 1862, p. 385, § 5.

[8] Stats. 1868, p. 589.

in the property, and the restoration of the term 'owner' in 1868 indicates that the legislature deemed that notice to the employer might not be sufficient if such employer was not also the owner." [9]

§ 549. **Statutory provision.** The California Code of Civil Procedure originally made no provision for any notice to the owner, except the recorded claim of lien, and the code continued in this condition until the enactment of section eleven hundred and eighty-four,[10] in substantially its present form, in 1885, when personal notice to the owner was again provided for, in addition to the recorded notice. The provision was again amended in 1887, so far as this subject is concerned, as follows: "Any of the persons mentioned in section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed [11] owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both. Such notice may be given by delivering the same to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous

[9] Corbett v. Chambers, 109 Cal. 178, 181, 41 Pac. Rep. 873.

Act of 1868, it is to be noted, however, provided only for the recorded notice, and not for the notice to the owner of the character discussed in this section.

[10] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[11] **The amendment inserted the word "reputed"** before the word "owner," wherever it occurs in the section. It is to be noted, in reference to this change, that the statute contemplates a lien upon the fund in the hands of the employer which is independent of the lien upon the property, which can only be created by the owner thereof, or through his agent, actual or ostensible, or through estoppel.

See "Constitutional Aspects," §§ 34 et seq., ante; "Estoppel," §§ 469 et seq., ante; "Agency," §§ 572 et seq., ante.

Utah. Compare act of 1890, § 12, permitting statement of intention to furnish materials, etc.: Morrison v. Carey-Lombard Co., 9 Utah 70, 33 Pac. Rep. 238.

place upon the mining claim or improvement.[12] No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters.[13] Upon such notice being given, it shall be the duty of the person who contracted with the contractor [14] to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person,[15] to answer such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case,[16] besides reasonable costs provided for in this chapter." [17]

§ 550. Notice to owner, and claim of lien. Distinction and purposes. This notice to the owner or employer, provided for in the statute, is not the claim of lien that is to be

[12] **The section, as it stood in 1885,** enumerated as the objects upon which the notice might be posted, "mining claim, building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon-road, or other structure."

[13] The words "reputed," before owner, and "or to put him upon inquiry as to such matters," were not in the provision of 1885.

[14] The provision of 1885 contained the word "owner," instead of the clause, "person who contracted with the contractor."

[15] The section, in 1885, contained the provision, "all money due or that may become due to such contractor or other person, or sufficient of such money to answer," etc.

[16] The provision of 1885 read, "including costs and counsel fees provided for in this chapter." The provision as to counsel fees, in the present statute, was declared unconstitutional: See § 40, ante.

[17] **The amendment of 1887,** so far as relates to this subject, also omitted from the end of the provision the following: "until such notice is by writing withdrawn; and all moneys paid thereafter by the owner to the contractor, or such other person, while such notice is in force, shall for the purpose of all liens of all persons, except that of the contractor, be deemed a payment prior to the time when the same was due within the meaning of and subject to the provisions of this section": See Stimson v. Dunham, C., H. Co., 146 Cal. 281, 79 Pac. Rep. 968.

Colorado. The notice to the owner of the intention to file a claim under the act of 1893 is for the owner's benefit, and he alone can raise objection, if it is not done: Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64.

recorded.[18] It has already been seen that the object of the recorded claim of lien is twofold, namely: 1. To give notice to the owner and others interested; and 2. To perfect and consummate the lien on the realty.[19]

The object and the effect of the notice to the owner, provided for in section eleven hundred and eighty-four,[20] differ in some vital particulars from those of the claim of lien, and the provision just quoted has introduced into the statute an element in some respects similar to, but in other respects essentially different from, the provisions in preceding statutes relating to personal notice to the owner. It has been said that "the main object of giving the personal notice of the claim to the owner of the building is to affect him with notice of the lien, and to afford him an opportunity to protect himself against the same in his dealings with the original contractor." [21]

It is the object of both the "claim" and the "notice" to affect the owner with notice, and to warn him not to make payment to the contractor, but to create a "fund," to the extent of which the claimant may go upon the property to

[18] Jewell v. McKay, 82 Cal. 144, 149, 23 Pac. Rep. 139.

Itemized account not required in notice to owner: See Heston v. Martin, 11 Cal. 41; Brennan v. Swasey, 16 Cal. 141, 76 Am. Dec. 507; Selden v. Meeks, 17 Cal. 131; Davis v. Livingston, 29 Cal. 283; Hicks v. Murray, 43 Cal. 522; Jewell v. McKay, 82 Cal. 144, 151, 23 Pac. Rep. 139; Leftwitch L. Co. v. Florence Mut. B. L. & S. Assoc., 104 Ala. 584, 594, 18 So. Rep. 48; Nichols v. Culver, 51 Conn. 179; Taylor v. Netherwood, 91 Va. 88, 93, 20 S. E. Rep. 509.

[19] Kellogg v. Howes, 81 Cal. 170, 179, 22 Pac. Rep. 509, 6 L. R. A. 588, 11 Pac. Coast L. J. 589.

See §§ 361 et seq., ante.

Colorado. Act of 1881 required both notices: Greeley Co. v. Harris, 12 Colo. 226, 20 Pac. Rep. 764; Sayre-Newton L. Co. v. Park, 4 Colo. App. 482, 36 Pac. Rep. 445; Denver H. Co. v. Croke, 4 Colo. App. 530, 36 Pac. Rep. 624 (1883).

As to record of affidavit that owner was unknown: Id. 8. See Schradsky v. Dunklee, 9 Colo. App. 394, 48 Pac. Rep. 666; Rice v. Carmichael, 4 Colo. App. 84, 34 Pac. Rep. 1010.

[20] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[21] Corbett v. Chambers, 109 Cal. 178, 182, 41 Pac. Rep. 873. In this able opinion, the learned justice does not refer to the fact that the statute then in force also provided for the personal notice to the owner here discussed.

See "Nature and Object of Claim," §§ 362, 365, ante.

Colorado. Rice v. Carmichael, 4 Colo. App. 84, 34 Pac. Rep. 1010 (1889). The owner at the time of notice is the one to receive it: **Id.,** p. 88.

enforce his lien; but furthermore, the object of the "notice to the owner" is to create a larger fund by an earlier notice than would be given by the recorded claim of lien, which, for obvious reasons, elsewhere discussed,[22] would in most cases be filed after many payments had been made to the contractor. The "notice to the owner," therefore, is a measure of extra precaution on the claimant's part, and it is optional with him to give it or not.[23]

§ 551. Notice to owner creating personal obligation. While the claim of lien is necessary to perfect and consummate the lien on the property, the "notice to the owner" or employer may create and perfect a personal obligation, independently of any lien upon any property, in the nature of a garnishment,[24] to the extent of the "fund," and this is

[22] §§ 362 et seq., ante. But see Valley L. Co. v. Struck, 146 Cal. 266, 80 Pac. Rep. 405.

[23] Jewell v. McKay, 82 Cal. 144, 149, 23 Pac. Rep. 139.

Montana. The notice to the owner provided by Rev. Stats., div. v, § 821, is essential: Whiteside v. Lebcher, 7 Mont. 473, 17 Pac. Rep. 548. The objection can be raised for the first time on appeal: Id.

[24] **Notice is in nature of garnishment,** and works an assignment pro tanto of the moneys due or to become due from the owner to the contractor: French v. Powell, 135 Cal. 636, 642, 68 Pac. Rep. 92.

In Weldon v. Superior Court, 138 Cal. 427, 429, 431, 71 Pac. Rep. 502, it was said: "Section 1184 of the Code of Civil Procedure is a part of the legislative scheme devised, pursuant to the constitutional provision, to provide security to mechanics, laborers, material-men, and others mentioned, for their labor bestowed or materials furnished in the erection or improvement of buildings. The giving of the statutory notice does not establish a lien on the fund in the owner's hands, in the sense that the recorded lien is established on the buildings and land, under section 1183, but it does not follow that no sort of equitable lien may not be enforced against the fund referred to in section 1184. The section first deals with the contract, and payments under it, and a reserved fund by the owner of twenty-five per cent of the contract price, which he is to withhold for thirty-five days. Provision is made to protect any lien-holder, under section 1183, from payments by the owner before due under the contract. It is then provided that 'any of the persons mentioned in section 1183, except the contractor, may at any time give to the reputed owner a written notice that they have . . . furnished materials.' . . .

"**The effect that may be given to this section** [eleven hundred and eighty-four of the Code of Civil Procedure] does not depend upon the lien provided for in section 1183. Whether the notice may result in establishing an equitable garnishment or assignment, or confers an equitable lien, or is a form of equitable subrogation regulated by statute, as it has been variously termed, this court has said: 'The right to control and direct the funds remaining in the hands of the

a vital distinction between the two. Notice to the owner or employer, therefore, has been provided for by the statute, upon the theory of a "fund," and the proceeding to enforce the lien upon the "fund," as distinct from a suit to foreclose a lien upon the "property," necessarily implies a personal liability of the employer to the extent of the "fund." [25]

§ 552. **Notice to owner. Garnishment.**[26] Under some early statutes, as pointed out in the preceding section, a personal notice to the owner was provided for, and the right given by reason of such notice was, in its nature, an attachment or garnishment without suit.[27] This was intended to prevent litigation, by substituting such a cheap, easy,

owner is as distinct and independent as the right to file and enforce a lien. It is a remedy entirely disconnected from and additional to the remedy by lien upon the building, . . . which should be regarded with favor by the court': Bates v. Santa Barbara County, 90 Cal. 543, 27 Pac. Rep. 438. See also First National Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. Rep. 45; Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

"**In Bianchi v. Hughes,** supra, it was said: 'This right to garnish the moneys of the contractor in the hands of the owner is limited by the terms of the section to the persons mentioned in § 1183, and is but a cumulative or additional remedy given for the purpose of enforcing in another mode the right for which, by § 1183, a lien is authorized.' Doubtless, Swinford, the material-man, might have brought his action, on the law side of the court, against Weldon, the contractor, and served the ordinary garnishment on the owner, Maher, but he was not restricted to this remedy. An action at law would not lie against the owner alone, for his liability would depend on the liability of the contractor being first determined. Where the action is by the material-man against both the owner and the contractor, the owner might defend by showing that there were other claimants to the fund, who had served like notice on him, in excess of the amount in his hands, and this would necessitate an accounting and an apportionment among the several claimants of the fund, after the liability of the contractor had been fixed. In most cases this very situation would arise. But such an action — and this is in fact such a one, except that there is but one claimant — would clearly be equitable. That the court should permit such proceeding to be brought, and thus determine in one action the rights of the parties and secure to the material-man the fruits of his notice, and compel the owner to perform the duty imposed upon him by statute, we feel quite sure": Weldon v. Superior Court, 138 Cal. 427, 429, 431, 71 Pac. Rep. 502.

[25] See McCrea v. Johnson, 104 Cal. 224, 37 Pac. Rep. 902.

[26] See § 17, ante, and §§ 683 et seq., post.

[27] Cahoon v. Levy, 6 Cal. 295, 297, 65 Am. Dec. 515 (1850); Davis v. Livingston, 29 Cal. 283, 287. See McAlpin v. Duncan, 16 Cal. 126, 128 (1858); Kellogg v. Howes, 81 Cal. 170, 172, 22 Pac. Rep. 509, 6 L. R. A. 588; Valley L. Co. v. Struck, 146 Cal. 266, 274, 80 Pac. Rep. 405.

and expeditious means of attaching in the hands of the owner or employer any moneys due from him to the contractor.[28] Besides the right given by the service of the notice upon the owner to enforce the lien upon the property, as above discussed, under the present statute, unlike prior statutes, the right to enforce the lien upon the "fund" is also given, independently of any lien upon the property.[29] In this connection, the supreme court has said: "Upon receipt of the notice the owner becomes liable as on garnishment or attachment.[30] 'It is a form of equitable subrogation regulated by statute.' [31] The rights of plaintiffs do not depend upon the legality of the contract. Whether it was void or valid, the contractor and subcontractor will be held to be the agent of the owner for the purposes of the law, and neither the owner nor the other can assert a want of privity between himself and the laborer or material-man. The right of plaintiffs to recover does not depend upon their

[28] Cahoon v. Levy, 6 Cal. 295, 297; Davis v. Livingston, 29 Cal. 283, 287; see McAlpin v. Duncan, 16 Cal. 126, 128.

[29] Knowles v. Joost, 13 Cal. 620, 621 (1856); Cahoon v. Levy, 6 Cal. 295, 297, 65 Am. Dec. 515 (1856).

Notice under early statutes. Such notice, however, did not, under the early statutes, create a personal liability, but a liability only through the intervention of the lien upon the property: Davis v. Livingston, 29 Cal. 283, 287. And the lien attached from the time of such notice in the case of subclaimants, and from the commencement of the work in the case of contractors, under the statute; the act being silent as to the time within which notice must be served: Cahoon v. Levy, 6 Cal. 295, 297, 65 Am. Dec. 515 (1856).

Distinction between original contractors and subclaimants does not exist under the present statute: See **Kerr's Cyc. Code Civ. Proc.,** § 1186; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 648, 22 Pac. Rep. 860.

Under act of 1855, the lien related back to the time that the work was commenced, and the right of creditors to attach a debt due from the owner to the contractor before notice of the claim of the subcontractor was subordinated to the latter, where the work was commenced before such garnishment: Tuttle v. Montford, 7 Cal. 358, 360. See "Priorities," §§ 486 et seq., ante.

If the claimant failed to give notice, he was obliged to yield to the claim of the attaching creditor: Cahoon v. Levy, 6 Cal. 295, 297, 65 Am. Dec. 515 (1856).

Colorado. Such notice need not be served by a contractor: Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519 (1883, 1889); nor upon a mortgagee: Id.

[30] Citing McAlpin v. Duncan, 16 Cal. 126, 128.

[31] Citing Loonie v. Hogan, 9 N. Y. 435, 439, 440, 61 Am. Dec. 683; Frank v. Chosen Freeholders, 39 N. J. L. (10 Vr.) 347; 2 Jones on Liens, § 1285.

right to a lien. The equitable garnishment provided for by section eleven hundred and eighty-four of the Code of Civil Procedure is a cumulative remedy in ordinary cases. . . . The true spirit and merit of the statute is lost sight of in the contention that this remedy is a mere substitute for the remedy by lien, and that when the latter does not exist, the former cannot exist. The right to control and direct the funds remaining in the hands of the owner is as distinct and independent as the right to file and enforce a lien. It is a remedy entirely disconnected from and additional to the remedy by lien upon the building; and as the exceptional element which it is claimed arrests in this case the usual operation of the lien law does not exist, it is a remedy which should be regarded with favor by the court." [32]

[32] Bates v. Santa Barbara County, 90 Cal. 543, 546, 27 Pac. Rep. 438; Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536.

"**The notice authorized** by this section has the effect of a garnishment of the moneys coming to the contractor which are in the hands of the owner, and, in the absence of any claim upon such moneys in behalf of other lien claimants, the owner will be liable to the material-man or subcontractor for the amount of the claim to the extent of his liability to the contractor. . . . This right to garnish the moneys of the contractor in the hands of the owner is limited by the terms of the section to 'the persons mentioned in § 1183,' and is but a cumulative or additional remedy given for the purpose of enforcing in another mode the right for which, by § 1183, a lien is authorized upon the property upon which the labor has been performed, or for which the materials were furnished. It does not confer upon them a right to collect from the owner any claim they may have against the contractor for labor and materials, other than is conferred elsewhere in the chapter, but provides that, instead of filing with the county recorder the notice of their claim of lien, and enforcing the same against the property, they may intercept the moneys in the hands of the owner to the extent of their claim, by giving him this notice. The remedy thus provided is limited to the cases in which, by § 1183, the property may be made subject to a lien, and the owner is not required, upon receiving such notice, to withhold from the contractor any moneys in his hands, except for materials furnished or labor performed upon the property": Bianchi v. Hughes, 124 Cal. 24, 27, 56 Pac. Rep. 510. In this case the contract was void, and there was no valid claim of lien; and no lien on the fund was allowed for material furnished which was not affixed to the building.

Under the act of 1862 it was held that the provision as to notice must be strictly complied with: Davis v. Livingston, 29 Cal. 283, 287.

See "Construction," §§ 24 et seq., ante.

On the subject of garnishment, see Wilson v. Samuels, 100 Cal. 514, 519, 35 Pac. Rep. 148; French v. Powell, 135 Cal. 636, 640, 68 Pac. Rep. 92; Newport W. & L. Co. v. Drew, 125 Cal. 585, 589, 58 Pac. Rep. 187, **distinguished** in Valley L. Co. v. Struck, 146 Cal. 266, 271, 80 Pac. Rep. 405.

§ 553. Provision, when applicable. The provision is confined to the "persons mentioned in section eleven hundred and eighty-three" of the Code of Civil Procedure,[33] and hence not for work on sidewalks, grading, etc., in incorporated cities, under section eleven hundred and ninety-one.[34] The provision as to notice, moreover, does not authorize a notice to the original contractor to intercept moneys due from him to his subcontractors.[35]

In the case of a valid statutory original contract,[36] as in the case of non-statutory original contracts,[37] heretofore discussed,[38] the claimant is entitled to a lien to an extent not exceeding the amount of the contract price in the hands of the owner when the claim of lien is filed, even if no notice is served on the owner. In the case of valid statutory original contracts, as in the case of other valid original contracts hereafter discussed, if the claimant desires to have further security for his labor or materials, it is necessary for him to give a notice to the owner or employer under section eleven hundred and eighty-four [39] before any proper payment is made to the contractor in accordance with the statute and contract. This not only insures his lien on the property to the extent of the moneys which the owner is notified to withhold from the contractor, but, as stated before, also gives him a lien upon the fund thus created in the hands of the employer, which may be enforced by a personal action against him.

§ 554. General rights upon service of notice. The plaintiff in an action, founded upon service of notice to the owner

[33] Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

[34] **Kerr's Cyc. Code Civ. Proc., § 1191.**

[35] Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. Rep. 442. See Bates v. Santa Barbara Co., 90 Cal. 543, 27 Pac. Rep. 438.

[36] Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 621, 25 Pac. Rep. 124.

[37] Gibson v. Wheeler, 110 Cal. 243, 245, 42 Pac. Rep. 810; Kerckhoff-Cuzner M. & L. Co. v. Cummings, 86 Cal. 22, 26, 24 Pac. Rep. 814; Wiggins v. Bridge, 70 Cal. 437, 439, 11 Pac. Rep. 754; Schmid v. Busch, 97 Cal. 184, 185, 31 Pac. Rep. 893; Turner v. Strenzel, 70 Cal. 28, 30, 11 Pac. Rep. 389 (apparently non-statutory original contract). See Rosenkranz v. Wagner, 62 Cal. 151, 154.

[38] See §§ 258 et seq., ante.

[39] See §§ 259 et seq., ante.

[39] **Kerr's Cyc. Code Civ. Proc., § 1184.**

or employer, under the statute, may obtain judgment for any deficiency there may be against the person to whom the materials were furnished or for whom the work was done.[40] The right given by the service of such notice, as against the contractor, does not depend upon the completion of the contract by the contractor.[41]

Right personal. The right to give the notice is personal, and does not pass by assignment; but it is thought that after the notice has been given, the assignee may enforce a lien upon the "fund," or against the owner or employer personally.[42]

§ 555. **Same. Early statutes.** Its effect, when served by the proper parties, and under certain conditions, is to create new rights and new liabilities,[43] not created by the record of a proper claim of lien. Prior to the amendments of March 18, 1885, creating statutory original contracts, and providing for notice to the owner, and where the statute did not impose any liability upon the owner or his property by a mere notice to the owner by a subcontractor, there was no duty imposed upon the owner to retain any portion of the contract price to satisfy any lien to secure which a subcontractor might subsequently file a claim of lien.[44]

[40] Bates v. Santa Barbara County, 90 Cal. 543, 27 Pac. Rep. 438.

In McCrea v. Johnson, 104 Cal. 224, 226, 37 Pac. Rep. 902, this question of personal liability was referred to, but not decided; but in First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45, it was held that the material-man is not required to record notice of his claim in the office of the county recorder, as in the case of claims of lien against the property or contractor, in order to avail himself of the remedy provided for by § 1184, **Kerr's Cyc. Code Civ. Proc.,** for intercepting the contract price in the hands of the owner by notice, and the validity of such notice is not dependent upon proceedings to enforce a lien upon the property affected by the contract, nor is such notice subject to the limitations provided for in § 1190 of same code, requiring suit to be commenced within certain time to foreclose the lien upon the property. See notes, § 552, ante.

[41] Russ L. & M. Co. v. Roggenkamp (Cal., Jan. 30, 1894), 35 Pac. Rep. 643.

[42] McCrea v. Johnson, 104 Cal. 224, 37 Pac. Rep. 902.

[43] McCrea v. Johnson, 104 Cal. 224, 226, 37 Pac. Rep. 902.

[44] McCants v. Bush, 70 Cal. 125, 126, 11 Pac. Rep. 601. But see Rosenkranz v. Wagner, 62 Cal. 151, 154, and Renton v. Conley, 49 Cal. 185, 188.

As to owner safely making payments as against third party not serving notice on him, as provided in § 1184, **Kerr's Cyc. Code Civ. Proc.,** see Valley L. Co. v. Struck, 146 Cal. 266, 270, 80 Pac. Rep. 405.

§ 556. Same. Under valid contract, generally. It has recently been held, in a case in the court of appeals, that, under a valid contract, notice to the owner to withhold money does not entitle claimant to a personal judgment against the owner for the sum due him in excess of the sum due the contractor, and that the equitable garnishment in fact is only to such sum as might be payable to the contractor after the extinguishment of the liens; for the reason, as it is stated, that until such liens are extinguished no sum is payable from the owner to the contractor, and that where the claims exceed the amount of money in the hands of the owner, there is nothing upon which the garnishment can operate.[45]

§ 557. Same. Claim of lien as equivalent of notice to owner. In case of a valid statutory original contract, the statute has provided when the last payment of "at least twenty-five per cent of the whole contract price" shall be made, namely, "at least thirty-five days after the final completion of the contract," and has made other restrictions upon payments.[46] If, therefore, a claim of lien is filed under such a contract, as required by law, it operates as a notice to the owner to at least the extent of the final twenty-five per cent; and such claim, so filed, by the express provisions of section eleven hundred and eighty-four,[47] also operates to fix a lien to the extent of any other payments made prior to the time set forth in the section or in the contract, at least when they have been previously garnished by notice to the

[45] Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681, 683. This view of the law, however, is a contracted one, and not in consonance with the general nature and effect of the garnishment, under the decisions of the supreme court. If there were no sum payable from the owner to the contractor, upon which the garnishment could operate, under a valid contract, the liens upon the property must also fail for lack of contractual liability upon the part of the owner to feed them. Unless the moneys impounded by the garnishment share in the fund, the amounts secured by the claims of lien, as against the fund, being decreed to be a lien upon the property, much difficulty will be found in reconciling previous decisions of the supreme court, and great confusion will be introduced into what heretofore appeared to be a somewhat clearly adjudicated subject.

[46] Kerr's Cyc. Code Civ. Proc., § 1184.
See "Payments," §§ 269 et seq., ante.

[47] Kerr's Cyc. Code Civ. Proc., § 1184.

owner.[48] And the property of the owner is subject to the lien to that extent, whether the payment is made before or after the filing of the claim of lien, provided such payment be made before the final payment is legally due.[49]

§ 558. Same. Valid statutory original contract. In connection with the subject discussed in the last section, the supreme court has said: "The [statutory original] contract must be so made as to require payments to be made in instalments, twenty-five per cent of which must be payable at least thirty-five days after final completion of the work and contract. When such a contract is filed for record, it is notice that payments are to be made as therein provided for. If the twenty-five per cent, which must be withheld until after the claim of lien is filed, is sufficient to pay his claim, the material-man need not give the personal notice provided for, and thereby stop the other payments. If such last instalment will not be sufficient, he may give the necessary notice, which compels the owner to withhold other payments. But if the contract is not filed in the recorder's office, it is not only void by the express terms of the statute, but he has no notice of the amount of payments to be made, or when they will fall due, or at what time he is required to give the personal notice. As a penalty for not affording him this means of knowledge by filing such a contract as is required by the statute, the owner is deemed to have contracted for the material, so far as the right to the lien is concerned, and his property is bound for the value of such material. It seems to us that the language of the statute, and its object and purpose in this respect, are too plain to need construction." [50]

[48] See Valley L. Co. v. Struck, 146 Cal. 266, 80 Pac. Rep. 405. This last is probably applicable to all original contracts.

See "Payments," §§ 269 et seq.; §§ 251 et seq.; §§ 540 et seq., ante.

[49] Reed v. Norton, 90 Cal. 590, 602, 26 Pac. Rep. 767, 27 Id. 426; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 646, 22 Pac. Rep. 860.

[50] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 645, 22 Pac. Rep. 860.

See "Valid Contract," §§ 315 et seq., §§ 556 et seq., ante; "Void Contract," §§ 319 et seq., ante.

If nothing is due at the time of service,[51] or subsequently becomes due,[52] under such valid contract, the claimant has no lien upon the property or fund, nor any claim against the owner, by reason of such service of notice merely.[53] If the owner or employer makes payments in good faith, in accordance with the terms of a valid non-statutory contract, before receiving the notice, the contractor's subclaimants cannot enforce their liens, except for the balance, if any, due the contractor;[54] and such payment is a complete discharge of the owner or employer to that extent.[55]

Abandonment. Where the notice is once served on the owner, it is thought that a subsequent abandonment of a valid contract by the contractor will not affect the right of the claimant with reference to moneys due at the time of the service of the notice by him.[56]

§ 559. Same. Void statutory original contract. In connection with void statutory original contracts, the court has

[51] Wiggins v. Bridge, 70 Cal. 437, 439, 11 Pac. Rep. 754. See Shuffleton v. Hill, 62 Cal. 483, 484, 6 West Coast Rep. 436; Gibson v. Wheeler, 110 Cal. 243, 245, 42 Pac. Rep. 810; Valley L. Co. v. Struck, 146 Cal. 266, 273, 274, 80 Pac. Rep. 405 (premature payment).

[52] Wiggins v. Bridge, 70 Cal. 437, 438, 11 Pac. Rep. 754. See Denison v. Burrell, 119 Cal. 180, 183, 51 Pac. Rep. 1 (non-statutory original contract).

[53] Henley v. Wadsworth, 38 Cal. 356, 360 (1862).

[54] Wiggins v. Bridge, 70 Cal. 437, 438, 11 Pac. Rep. 757; Rosenkranz v. Wagner, 62 Cal. 151, 154; Dingley v. Greene, 54 Cal. 333, 335; Wells v. Cahn, 51 Cal. 423, 424; McAlpin v. Duncan, 16 Cal. 126, 128 (1858); Knowles v. Joost, 13 Cal. 620, 621 (1856).

In Renton v. Conley, 49 Cal. 185, 187 (1868), it was stated that the notice might be "actual or constructive," the court saying (p. 188), "There is no express provision limiting the lien to the amount which may be owing from the owner to the contractor under the contract, in any case, even though the materials were furnished and the labor performed at the instance of the contractor alone." The statute in this case did not provide for any "actual notice," but only notice by record of claim of lien. But see McCants v. Bush, 70 Cal. 125, 126, 11 Pac. Rep. 601; Kellogg v. Howes, 81 Cal. 170, 177, 22 Pac. Rep. 509, 6 L. R. A. 588. See Latson v. Nelson (Cal.), 11 Pac. Coast L. J. 589; Tuttle v. Montford, 7 Cal. 358, 360 (1855).

Nevada. Contra: Under act of 1875: Hunter v. Truckee Lodge, 14 Nev. 24; Lonkey v. Cook, 15 Nev. 58.

See notes, §§ 452 et seq., ante.

[55] McAlpin v. Duncan, 16 Cal. 126; Kerckhoff-Cuzner M. Co. v. Cummings, 86 Cal. 22, 26, 24 Pac. Rep. 814.

[56] Russ L. Co. v. Roggenkamp (Cal., Jan. 30, 1894), 35 Pac. Rep. 643. See "Abandonment," §§ 358 et seq., and §§ 526 et seq., ante.

said: "It is further claimed by the respondent that the judgment of the court below was right, because it found that the personal notice provided for in section eleven hundred and eighty-four of the Code of Civil Procedure was not given. The notice referred to was not necessary in this case. Its only object and purpose, as indicated by the statute, is to compel the owner to withhold payments due the contractor, for the better security of the material-man. In this case there was no contract, and no payments to stop. Not only so, but the statute provides that, where the contract is not made as required and filed in the recorder's office, 'the labor done and materials furnished by all persons except the contractor, shall be deemed to have been done and furnished at the special instance of the owner, and they shall have a lien for the value thereof.'" [57]

§ 560. Same. Non-statutory original contract. The notice to the owner or employer provided for in section eleven hundred and eighty-four [58] may also be given, where the

[57] Davies-Henderson L. Co. v. Gottschaik, 81 Cal. 641, 644, 22 Pac. Rep. 860, citing Kellogg v. Howes, 81 Cal. 170, 22 Pac. Rep. 509, 6 L. R. A. 588; Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 16 Pac. Rep. 516.

Kerr's Cyc. Code Civ. Proc., § 1183.

See "Liability under Void Contract," §§ 319 et seq., §§ 559 et seq., ante.

In discussing this subject, the court said: "If the contract is valid, then, under the present statute, notice must be given of his claim by the material-man or laborer, in order to reach the moneys due the contractor, and if he fails to give such notice, the owner is protected by the statute, as held in the cases above cited, decided under former statutes. [This language must be limited to certain cases of non-statutory original contracts, and probably the word "notice" is restricted in meaning to the recorded notice or claim of lien.] But, where there is no valid contract, this notice is unnecessary, because there are no payments to be stopped, and the statute itself is notice to the owner that he must not pay to the contractor": Kellogg v. Howes, 81 Cal. 170, 177, 22 Pac. Rep. 509, 6 L. R. A. 588.

Notice served upon owner under void contract; personal judgment for amount due under the terms of such void contract: See Hubbard v. Lee (Cal. App., Oct. 11, 1907), 92 Pac. Rep. 744.

Utah. Under the act of 1890 it was held that as the lien related back to the time of commencing to furnish the material, a payment made by the owner to the contractor subsequent thereto, but before the filing of the claim of lien, and without other notice, was at the peril of the owner: Carey-Lombard L. Co. v. Partridge, 10 Utah 322, 37 Pac. Rep. 572; Morrison v. Carey-Lombard L. Co., 9 Utah 70, 33 Pac. Rep. 238; Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764 (1888).

[58] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

contract is a non-statutory original contract, to intercept money in the hands of the reputed owner.[59] The lien of subclaimants upon the property of the owner can be enforced for all sums to be paid to the contractor, due under a non-statutory original contract when the notice is given,[60] or to become due thereafter.[61]

§ 561. **Same. Effect of notice on payments already made or assigned.** The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect upon payments that have matured before it is given, which have not been made, is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment is intercepted by the notice; but if he has already assigned them to a third party, the notice will be inoperative to prevent their payment to such third party.[62] In this connection, the court has said: "If the contractor, previous to the giving of the notice, has transferred to another, who takes the assignment for value, and without notice of the latent equities of the material-man, the amount then actually due and payable on the contract, there is then nothing either due or to become due to him, and there is no fund on which the notice can operate. It is true that the statute declares that a material-man, or other person deal-

[59] Kerckhoff-Cuzner M. Co. v. Cummings, 86 Cal. 22, 25, 24 Pac. Rep. 814 (under $1,000). See Schmid v. Busch, 97 Cal. 184, 188, 31 Pac. Rep. 893.

[60] Blythe v. Poultney, 31 Cal. 233, 237; Whittier v. Hollister, 64 Cal. 283; Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747; Turner v. Strenzel, 70 Cal. 28, 30, 11 Pac. Rep. 389; Southern Cal. L. Co. v. Jones, 133 Cal. 242, 245, 65 Pac. Rep. 378.

Colorado. Jensen v. Brown, 2 Colo. 694; McIntyre v. Barnes, 4 Colo. 285; Tabor v. Armstrong, 9 Colo. 285, 12 Pac. Rep. 157 (Gen. Laws, § 1657; under the same original contract, but not for damages suffered by subcontractor).

[61] Davis v. Livingston, 29 Cal. 283, 291 (1862); Blythe v. Poultney, 31 Cal. 233, 237; Whittier v. Hollister, 64 Cal. 283; First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 61, 40 Pac. Rep. 45; Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747.

Colorado. See Jensen v. Brown, 2 Colo. 694.

[62] Newport W. & L. Co. v. Drew, 125 Cal. 585, 589, 58 Pac. Rep. 187. See Bates v. Santa Barbara County, 90 Cal. 543, 27 Pac. Rep. 438; First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 40 Pac. Rep. 45.

Payment by owner not invalid as to lien-holders who had not given previous notice of their claims, as provided in § 1184, **Kerr's Cyc. Code Civ. Proc.**: Valley L. Co. v. Struck, 146 Cal. 266, 270, 80 Pac. Rep. 405.

ing with the contractor, may give the notice 'at any time'; but this expression must be construed in connection with the other provisions relating to the subject, and the general scheme of the code chapter of which they form a part. That chapter contemplates throughout that the privileges it allows to those who furnish material or labor for the construction of buildings and other improvements shall be exercised with promptitude, and so as not to hamper either the owner or the contractor, or those who deal with them, in the free disposition of the property rights affected by or arising from the contract, beyond such time as may be convenient for the assertion of those privileges. It cannot be supposed that the legislature, while requiring a portion of the contract price to be withheld from the contractor for the period of only thirty-five days after the completion of the contract, and making it incumbent on the material-man desirous of acquiring a lien to give public notice thereof by filing his verified claim therefor in the proper office within thirty days from the actual or presumed completion of the structure or other work, and to begin his action in the proper court for the enforcement of his claim within ninety days following the filing, yet designed that the same material-man may, without imparting notice in any manner to the public, retain a latent lien for an indefinite time after completion of the contract, and after payment is due thereunder, on the compensation earned by the contractor, and that this secret equity 'may at any time' be asserted, not only against the contractor, but also against those who have acquired his property interests therein by assignment or otherwise. We hold in this behalf: 1. That the right of the intervener to give the notice of its demand, and thus to charge the contract price in the hands of the owner, was not affected by any assignment made by the contractor until after the time when the demand assigned became due, — in this case upon the expiration of thirty-five days from the completion of the contract; 2. That the assignment made by the original contractor, the Silver Gate Manufacturing Company, to the Ætna Iron and Steel Company, before the completion of the work, vested the latter company, prior to the expiration of thirty-five days from the date of such completion, with no

rights anywise different from or superior to those of the original contractor, nor even then, if such assignment was made as part of a mere substitution of the Ætna company for the contractor in the original contract. — a matter on which the findings are not clear; 3. But that the assignment by the Ætna Iron and Steel Company to the plaintiff of the contract price, or the balance thereof, and notice to defendant of such assignment after the balance was due and payable under the terms of the contract, cut off all rights of the intervener in the funds so assigned, and any notice afterward given by the intervener was futile, provided the plaintiff took such assignment for value, and without notice of the unpaid demand of the intervener. We think such proviso just; if the plaintiff was a mere volunteer, or trustee for the Ætna company, or did not render value for the assignment, there is no reason why it should not stand precisely in the shoes of its assignor, subject to any right of the intervener, within the doctrine asserted in Bush v. Lathrop.[63] This qualification of the immunity of the assignee is commonly found in the authorities which, with the better reason, as it seems to us, affirm the right of the assignee, in good faith and for value, to take the subject of the assignment free from the latent equities of third persons." [64]

§ 562. Same. Payment by note. If the transferee of a promissory note is an innocent purchaser for value, and without notice of the demands of the contractor's subclaimants, and the note is secured by an assignment of moneys to become due from the owner of the building, and such claimants give no notice to the owner until after the expiration of thirty-five days from the completion of the work, and until after such transfer of the note and security, the right of such transferee in the fund due from the owner is superior to that of the subclaimants.[65]

[63] Bush v. Lathrop, 22 N. Y. (8 Smith) 535.

[64] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 62-64, 40 Pac. Rep. 45 (statutory original contract), citing Wright v. Levy, 12 Cal. 257, and other cases.

And see Kerr's Cyc. Code Civ. Proc., §§ 368, 440, and notes; Kerr's Cyc. Civ. Code, § 1459, and note.

But see discussion and criticism, § 595, post.

[65] Perry v. Parrott, 135 Cal. 238, 245, 67 Pac. Rep. 144.

§ 563. Same. Relation to provision as to premature payments. It has been held, subject to several later criticisms, that the provision as to notice to the owner is entirely separate and distinct from the provision invalidating payments prematurely made; that the proceeding under the notice is in the nature of a garnishment, whereby there is impounded specific moneys due or thereafter to become due to the contractor; and that the provision of the law as to premature payments is not made to depend upon the giving of or failure to give notice.[66]

It has also been held that, under a valid contract, where payments are made by the owner of the building to the contractor before the same are due, it is not necessary, in order that the subclaimant may recover the sums paid, that he should have given the notice required by section eleven hundred and eighty-four;[67] the court saying, "The position of respondents is based upon another portion of section eleven hundred and eighty-four,[68] which allows a notice to be served upon the reputed owner by a material-man or other creditor, which has the effect of stopping the payment of further moneys to the contractor. That provision of the law is not applicable here, and in no way weakens or limits the effect to be given the other part of the same section which we have already quoted";[69] i. e., that a premature payment shall be deemed as if not made, etc. It is to be noted that the supreme court of California has finally stated that premature payments are not invalid as against lienholders who have given no notice to the owner, except as to

[66] Sweeney v. Meyer, 124 Cal. 512, 514, 57 Pac. Rep. 479.

Criticism of doctrine. But this latter doctrine was subjected to criticism in the concurring opinion of Shaw, J. (Beatty, C. J., and Angellotti, J., concurring), in Valley L. Co. v. Struck, 146 Cal. 266, 80 Pac. Rep. 405, holding that Sweeney v. Meyer, supra, should be overruled, and that only in cases where notice had been served upon the owner before premature payment, except in the case of the final payment of twenty-five per cent thirty-five days after completion of the building, required by the statute, such premature payments were not affected by the mere filing of a claim of lien without such notice. See Dunlop v. Kennedy (Cal., Aug. 31, 1893), 34 Pac. Rep. 92 (rehearing granted).

[67] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[68] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[69] Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. Rep. 512 (question of pleading).

the final instalment of twenty-five per cent to be paid in thirty-five days after the completion of the building, as required by the statute.[70]

Waiving certificate of architect. Under the rule last stated, the owner has no power to waive a certificate, which was one of the conditions of maturity of the payment, as against claimants of liens who had garnished the payment by notice, but the premature payment was not invalid as against lien-holders who had given no such notice.[71]

[70] Valley L. Co. v. Struck, 146 Cal. 266, 272, 80 Pac. Rep. 405, per Shaw, J. (Beatty, C. J., and Angellotti, J., concurring in holding that Sweeney v. Meyer, 124 Cal. 512, 57 Pac. Rep. 479, should be overruled).

[71] Valley L. Co. v. Struck, 146 Cal. 266, 272, 80 Pac. Rep. 405, per Shaw, J. (Beatty, C. J., and Angellotti, J., concurring in holding that Sweeney v. Meyer, 124 Cal. 512, 57 Pac. Rep. 479, should be overruled on this point).

In the concurring opinion of Shaw, J., in Valley L. Co. v. Struck, 146 Cal. 266, 274, 80 Pac. Rep. 405, quoting from the dissenting opinion of Beatty, C. J., filed in the former hearing in bank, it was said: "By the mechanic's-lien law the owner and contractor are authorized to stipulate for the payment of three fourths of the contract price of a building by instalments to become due, at their option, at or before its completion, but no notice of lien can be recorded until after completion, and consequently no lien can be acquired upon the building by merely recording notice for any greater portion of the contract price than the twenty-five per cent, which must be made payable not less than thirty-five days after completion, unless the owner and contractor voluntarily agree that a larger proportion may be retained until after the time when the lien notices may be recorded. But the law also provides for personal and actual notice to the owner by a laborer or material-man of his claim, at, or at any time after, the time it accrues, irrespective of the completion of the building, and this notice operates as a garnishment to intercept the payment of any instalment of the contract price not then due by the terms of the contract, compelling the owner to withhold a sufficient sum to answer such claim and costs. Upon due service of such notice, the owner becomes liable to the extent of all money to become due upon the contract, and in the event that a notice of lien is afterwards duly recorded by the claimant, his building is subjected to a lien as security for the just amount of the claim, and that notwithstanding he may have made a premature payment upon the contract price before the receipt of notice. But this is as far as the statute goes. It does not make the premature payment of an intermediate instalment of the contract price invalid as to all material-men, laborers, etc., but only when the effect of allowing its validity would be to defeat, diminish, or discharge a lien in favor of persons other than the contractor. So that if it is an essential condition prerequisite to the creation of a lien upon the building for any portion of a particular instalment of the contract price, written notice of the claim should be served upon the owner before payment is due, and if no such notice is served, a premature payment of such instalment does not defeat, diminish, or discharge the lien, — there is no lien to defeat or impair, — and the failure of the security is due, not to the fault of the owner, but to the default of the claimant who has omitted to take the step made essen-

§ 564. Same. Service of notice on public trustees. And although a public body, such as a board of education, is not subject to garnishment,[72] yet a material-man or mechanic who furnishes materials to or does work for the contractor on a county building, upon giving written notice to the county of his claim as provided by section eleven hundred and eighty-four,[73] acquires, as against the contractor, a prior right of payment of his claim from the unpaid portion of the contract price; the court saying, "It is the only

tial by the statute for the acquisition of a lien. His lien has not been discharged or defeated or diminished by the premature payment, because it has never come into existence. If a payment is due on the 19th, and a material-man desires, for his better security, to have it withheld by the owner, he must give notice of his claim before the 19th, or the owner may make payment with perfect assurance that he will not have to pay again on account of the material-man's claim, as the latter well knows. But if he, with this knowledge, omits to give the notice [the present case], what right then has he to complain that payment was made on the 17th? He is no worse off than he would have been if it had not been made till the 19th. His notice of lien subsequently filed attaches to the last payment due thirty-five days after completion of the building, but, according to the intent no less than the language of the statute, it does not attach to any previous instalment not garnished by actual notice before it fell due.

"The decision in Sweeney v. Meyer resulted, in my opinion, from the assumption that the provisions of the statute as to notice to the owner and invalidity of premature payments are separate and independent. They are indeed separate, as every clause of every statute is necessarily separate from other clauses, but that they are independent I cannot admit. They are related parts of one general scheme, designed to be complete and harmonious, operating for the benefit of laborers, mechanics, and material-men, without injustice to owners of property. Upon each class a duty is imposed, and the performance of this duty is the condition of enjoying the rights conferred. To intercept a payment and secure a lien, notice of the claim must be served before payment is due. To give the amplest opportunity for service of notice, the owner must make no payment until it is due according to the terms of his recorded contract. If he makes a premature payment, he does it at the risk of having to pay twice, but he incurs this liability only in case of a timely notice. If no notice is given, there is no lien, and to hold the payment valid harms no one."

[72] Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536; French v. Powell, 135 Cal. 636, 642, 68 Pac. Rep. 92. The lower court was ordered to distribute the balance of the money to a garnishing creditor because the board had voluntarily deposited the money into court, and the parties had been interpleaded: See Skelly v. School Dist., 103 Cal. 652, 659, 37 Pac. Rep. 643.

Colorado. Florman v. School Dist., 6 Colo. App. 319, 40 Pac. Rep. 469.

Washington. Filing notice of claim with municipal body, under Ballinger's Ann. Codes and Stats., §§ 5925, 5927, as amended by Laws 1899, ch. cv, p. 172, condition precedent: See Huggins v. Sutherland, 29 Wash. 552, 82 Pac. Rep. 112 (pleading).

[73] **Kerr's Cyc. Code Civ. Proc., § 1184.**

remedy provided by the lien law, because the pursuit of the remedy by foreclosure would involve the taking of buildings which, on the ground of public policy and public necessity, are exempt from execution and forced sale. And this remedy is one which does not contravene any principle of public policy. It operates as an assignment pro tanto of the money due by the owner to the contractor, and in no way affects the public buildings. The fund is in the treasury, and the statute justly provides that instead of paying it to the contractor for the work which he agreed to do, but which the laborer has actually performed, the owner shall pay it to the latter." [74]

A notice given to trustees of a state building, by a subclaimant, is equivalent to a garnishment of the moneys payable to the contractor, and operates as a notice to intercept any payments that may mature after it is given, as well as those then due; but its effect on payments that have matured before it is given, but which have not been made, is determined by the rights of the contractor in reference thereto. If he is still entitled to demand their payment from the owner or trustees, such payment is intercepted by the notice; if, however, he has already assigned them to a third party, the notice will be inoperative by reason of their payment to such party.[75]

Besides the remedy on the bond, given under act of March 27, 1897,[76] by a contractor on state and other public buildings, laborers and material-men have recourse also to section eleven hundred and eighty-four,[77] by which they get an additional security by lien upon the fund, although not upon the land.[78]

[74] Bates v. Santa Barbara Co., 90 Cal. 543, 547, 27 Pac. Rep. 438; Russ L. & M. Co. v. Roggenkamp (Cal., Jan. 30, 1894), 35 Pac. Rep. 643.

For statutes in relation to public work, see § 102, ante, and "Sureties," §§ 605 et seq., post.

Colorado. Control by equity of funds in the hands of the board, due to contractor: See Florman v. School Dist., 6 Colo. 319, 40 Pac. Rep. 469.

[75] Newport W. & L. Co. v. Drew, 125 Cal. 585, 58 Pac. Rep. 187.

[76] Stats. 1897, p. 201.

[77] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[78] French v. Powell, 135 Cal. 636, 642, 68 Pac. Rep. 92.

§ 565. **Time of giving notice.** The subclaimant may give the notice to the reputed owner " at any time " before the money becomes due according to the contract, and no assignment made by the contractor of the amount to become afterwards due to him in the course of performance of the contract can, before the arrival of the time of payment, defeat the right of the subclaimant to give the statutory notice and obtain the benefit thereof; otherwise the provisions of the statute in this regard could in most instances be evaded.[79] And the notice may be effectually given, so long as money is owing to the contractor himself, although the time when it should have been paid has passed,[80] and as long as the fund is in the hands of the owner, reputed owner, or employer, and even after the expiration of the thirty-five days after the completion of a valid statutory original contract.[81]

§ 566. **Joint contractors. Apportionment.** Where joint contractors, under a non-statutory original contract, apportion the compensation under the contract between themselves, by an arrangement to which the owner is not a party, it is no defense that when notice was served there was nothing due the contractor to whom the materials were furnished under the apportionment agreed upon.[82]

§ 567. **Action on notice.** By the service on the owner of the notice prescribed by the statute, the claimant has a lien or charge upon the fund or amount due and unpaid to the contractor, remaining in the owner's hands, and it may be reached by an equitable suit, without a lien upon the land, and a writ of review will not lie against the superior court in such case, even though the amount claimed is less than three hundred dollars.[83]

[79] First Nat. Bank. v. Perris Irr. Dist., 107 Cal. 55, 61, 40 Pac. Rep. 45; French v. Powell, 135 Cal. 636, 642, 68 Pac. Rep. 92.

[80] First Nat. Bank v. Perris Irr. Dist., supra; Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536.

See §§ 585 et seq., post.

[81] Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536.

[82] Davis v. Livingston, 29 Cal. 283, 290 (the court lays stress upon the fact that the employer gave a verbal assent without consideration).

[83] Weldon v. Superior Court, 138 Cal. 427, 71 Pac. Rep. 502.

§ 568. **Form and contents of notice.**[84] **Construction.** The notices required to be given under the statute have regard to substance, rather than to form,[85] being remedies which should be favored by the courts.[86] And "no such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him on inquiry as to such matters." [87]

§ 569. **Same. Effect of several notices served.** Under a previous statute it was held unnecessary to return the notice, or to object to its sufficiency at the time it was served, nor did a failure to pursue either of these courses operate as a waiver of all defects. The notice is in invitum, looking to an attachment under the statute, and the question is not as to what the owner failed to do, but as to what the claimant did; and it was held that if the subclaimant served more than one notice for the same account, the several notices could not be considered together for the purpose of determining the sufficiency of notice to the owner, but that each must stand on its own merits, and a lien will not exist by reason of such notice, nor the owner be affected by notice, unless one notice is sufficient.[88] Each notice was considered

[84] **Compare:** "Claim of Lien," §§ 370 et seq., post.

Colorado. Service (act of 1889) by giving copy to clerk of superintendent of corporation is not service upon the owner, agent, or trustee, required by act: Union Pac. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. Rep. 1095.

[85] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873. See McGinty v. Morgan, 122 Cal. 103, 105, 54 Pac. Rep. 392; Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 78 Pac. Rep. 21.

[86] Bates v. Santa Barbara Co., 90 Cal. 543, 27 Pac. Rep. 438; Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536.

[87] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

Under act of 1862 it was held that the provision as to the notice must be strictly complied with, there being no provision as to construction: Davis v. Livingston, 29 Cal. 283, 287.

See "Construction," §§ 24 et seq., §§ 371 et seq., ante.

The present provision as to notice, it should be borne in mind, has an essentially different object, in part, as fully discussed in § 550, ante. It would seem that, as in the case of the claim of lien, nothing need be inserted in the notice except what is required by the statute: See Davis v. Livingston, 29 Cal. 283, 288.

See also "Claim of Lien," §§ 361 et seq., ante.

[88] Davis v. Livingston, 29 Cal. 283, 288 (under act of 1862, requiring written notice to the employer of the original contractor of the nature and extent of their claims against the original contractor or his assigns, over and above all payments, etc.).

absolutely, and not relatively under the act, and hence error in a previous notice did not vitiate a subsequent notice.[89]

How far these rules are applicable to section eleven hundred and eighty-four[90] does not appear. The provision of this section, that if the notice is sufficient to put the owner "upon inquiry as to such matters," the statute is satisfied, seems to modify the doctrines just stated.

§ 570. Same. Statutory requirements of notice. The five requirements of the notice, under section eleven hundred and eighty-four,[91] will be considered in order.

1. That the claimant has "performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so." It was held, under the act of 1862, that the want of signature to the notice vitiated the notice, even if it purported, in the body of the notice, to come from the claimant.[92] But as such a notice may be sufficient to put the owner "upon inquiry" under the present provision, as shown above, it may be doubted whether this ruling will be followed.

2. "In general terms the kind of labor and materials." Where the notice states in general terms the kind of materials, it is sufficient to satisfy this provision.[93]

3. "The name of the person to or for whom the same was done or furnished, or both." If the notice states that the

[89] Davis v. Livingston, 29 Cal. 283.

[90] **Kerr's Cyc. Code Civ. Proc.**, § 1184.

[91] **Kerr's Cyc. Code Civ. Proc.**, § 1184.

[92] Davis v. Livingston, 29 Cal. 283, 288. It was said that it was not shown to be in the claimant's handwriting, "and if that fact had appeared, no authorities are adduced to show that the want of a signature would have been cured thereby." The statute, however, did require the notice to be signed.

[93] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747. **Under act of 1862** it was held that the notice was not required to state the particular character of the materials furnished, nor that the materials were used in constructing a building, nor of what the materials named in the notice consisted: Davis v. Livingston, 29 Cal. 283, 288.

The act of 1862 did not expressly require the character of the materials to be stated, but only the "nature and extent of the claim," which "may as well be understood without the aid of such details, as with it." The notice stated: "We have furnished and supplied the following materials as hereinafter set forth for the erection," etc., but the materials were not "set forth" therein. See note following.

materials were furnished at the instance and request of the contractors, naming them, it is sufficient.[94]

4. "The amount in value, as near as may be, of that already done or furnished, or both." The expression "amount in value" seems to mean the price or agreed value, in case where there is an agreed value.[95]

5. If it states that "the amount agreed to be paid for all thereof" is a certain sum, or if it states the total price of the materials, it is sufficient.[96]

§ 571. **Same. Sufficiency of notice.** Under the provision as to notice contained in section eleven hundred and eighty-four,[97] where the notice stated in general terms the kind of materials; that they were furnished at the instance and request of the contractors, naming them; that the amount agreed to be paid for all thereof was a certain sum, — it was held sufficient.[98]

[94] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747. **Under act of 1862** it was held that if there are several contractors, the notice is sufficient if the name of one of them be given: Davis v. Livingston, 29 Cal. 283, 289. "The failure to name the two co-contractors does not very clearly go to the 'nature of the claim' [required to be stated by the statute], and even if it does, it is but a false description, which is set right by the other statements in the notice": Russ L. & M. Co. v. Garrettson, supra.

[95] See Jewell v. McKay, 82 Cal. 144, 150, 23 Pac. Rep. 139 (dictum, so far as notice is concerned).

[96] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747. See Davis v. Livingston, 29 Cal. 283, 287.

See "Claim," §§ 375 et seq., ante.

Oregon. Previous transfers of or liens upon the fund actually due to the contractor from a railroad company at the time notice is served under Laws 1889, p. 75, will take precedence over such notice: Coleman v. Oregonian R. Co., 25 Oreg. 286, 35 Pac. Rep. 656.

Such notice attaches only for the amount actually due at the time such notice is served: Ban v. Columbia S. R. Co., 109 Fed. Rep. 499, 54 C. C. A. 407, **reversing** s. c. 109 Fed Rep. 499.

[97] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[98] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747.

CHAPTER XXVIII.

AGENCY.

§ 572. General principles. Actual and ostensible agency.
§ 573. Agency by statutory estoppel.
§ 574. Same. Purpose.
§ 575. Same. Statutory provision.
§ 576. Same. When contract is void.
§ 577. Person in possession as agent of owner.
§ 578. Same. Person working mine.
§ 579. Architect as agent.
§ 580. Presumption of agency raised.
§ 581. Undue extension to statutory agency of rules applicable only to common-law agency.
§ 582. Personal liability of agent.
§ 583. Agency to receive notice of claims of subclaimants.
§ 584. Principal bound by notice to agent.

§ 572. General principles.[1] Actual and ostensible agency. The general law of agency applies to the "owner," inde-

[1] See, generally, Renton v. Conley, 49 Cal. 185, 187; Gibson v. Wheeler, 110 Cal. 243, 244, 42 Pac. Rep. 810; Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401; Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 291, 65 Pac. Rep. 578.

As to authority of agent to create mechanic's lien, see 61 Am. Dec. 696.

See "Constitutional Aspects," §§ 28 et seq., ante; "Estoppel," §§ 469 et seq., ante; "Pleading," §§ 695 et seq., post; "Evidence," §§ 779 et seq., post; "Parties," §§ 662 et seq., post.

Husband as agent of wife: See Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 48 Pac. Rep. 109, 59 Am. St. Rep. 174. See notes 61 Am. Dec. 693; 83 Am. St. Rep. 518-524; 10 L. R. A. 33.

Married woman's property, when subject to mechanic's lien: See, generally, note 83 Am. St. Rep. 517.

Oklahoma. Wife not personally liable, where husband enters into contract concerning her separate property: See Limerick v. Ketcham (Okl.), 87 Pac. Rep. 605 (under Stats. 1893, § 4527).

Wife as agent of the husband: See Fulkerson v. Kilgore, 10 Okl. 655, 64 Pac. Rep. 5.

Utah. Where the husband makes a contract as agent of the wife, or she expressly ratifies the contract as made, lien allowed; otherwise not, even though wife occupies the premises with her husband and knows the work is going on: Morrison v. Clark, 20 Utah 432, 59 Pac. Rep. 235, 77 Am. St. Rep. 924 (under Sess. Laws 1894).

Washington. "The husband is empowered to contract for the erection of buildings on the community real estate, and thus subject it to mechanics' liens": Douthitt v. MacCulsky, 11 Wash. 601, 606, 40

pendently of any statute.[2] An agency is either actual or ostensible.[3] An agency is actual when the agent is really employed by the principal.[4] An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent, who is not really employed by him.[5]

§ 573. **Agency by statutory estoppel.** An ostensible agent may be said to be the agent of one against whom the equitable doctrine of estoppel may be invoked. Mechanic's-lien statutes generally, for the purposes of the statute, create a new species of agency, which may be considered an agency by statutory estoppel, or, under certain circumstances, as the cases sometimes express it, a presumption of agency arises; by which is meant that a rule of evidence is established by the statute. It must be admitted, moreover, that some cases go almost to the point of making this presumption conclusive, and the adjudications are not in a satisfactory condition.

§ 574. **Same. Purpose.** Section eleven hundred and eighty-three,[6] as suggested in the last preceding section, goes

Pac. Rep. 186; Littell & S. Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. Rep. 1035.

Husband, as agent of wife, contracting for construction on the separate property of wife: See Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789.

Where it is not shown that the wife had any knowledge of the contract made by her husband relative to her separate property, and the only proof tending to show the husband's agency was the fact that the husband and wife had executed a mortgage upon certain lands, including the tract in controversy, which recited, among other things, that they thereby bound themselves to make improvements on said lands, and that the husband had told the plaintiffs they were borrowing money for the purpose of putting up a building, there is insufficient proof of the husband's agency: Cattell v. Fergusson, 3 Wash. 541, 28 Pac. Rep. 750.

Husband not agent of owner: See Anderson v. Hilker, 38 Wash. 632, 80 Pac. Rep. 848. But see Anderson v. Harper, 30 Wash. 378, 70 Pac. Rep. 965.

[2] See "Claim of Lien," § 385, ante.

[3] **Kerr's Cyc. Civ. Code,** § 2298, and note.

[4] **Kerr's Cyc. Civ. Code,** § 2299, and note.

See also McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622; Renton v. Monnier, 77 Cal. 449, 19 Pac. Rep. 820.

[5] See **Kerr's Cyc. Civ. Code,** §§ 2300, 2317, and notes.

[6] **Kerr's Cyc. Code Civ. Proc.,** § 1183, as amended Stats. 1903, p. 84.

beyond the ease of actual ageney, and even beyond that of "ostensible" ageney, and superimposes a presumption of special and peculiar statutory ageney, for the purposes of the chapter, which exists under the circumstances set forth in the statute; namely, when certain persons enumerated have "charge of any mining, or work and labor performed in and about such mining claim or claims, or real property worked as a mine, or the construction . . . of any building or other improvement as aforesaid, or of such mining claim or claims, either as lessee or under a working bond or contract thereon, with the privilege of purchase, or otherwise." [7]

[7] See McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622.

See "Estoppel," §§ 469 et seq., ante.

Colorado. See Laws 1893, § 1, p. 315.

"Implied agent": See Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989.

Laws 1893, ch. cxvii, §§ 1, 2, p. 315, held constitutional, although undertaking to make out of the contractor, who is an adverse party to the owner of the property, an agent of the owner: See Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 789.

Without express provision, the contractor would possess the powers of an agent: Id.

Hawaii. The statute makes the contractor the agent of the owner against the wishes of the latter, but to a very limited extent only; namely, for the purpose of purchasing suitable materials to be put into the building, but not for the contractor's own benefit: Allen v. Redward, 10 Hawn. 151, 158.

Montana. See Merrigan v. English, 9 Mont. 113, 22 Pac. Rep. 454, 5 L. R. A. 837.

New Mexico. See Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

Oregon. Contractor "special" agent of owner, with limited powers: Beach v. Stamper, 44 Oreg. 4, 74 Pac. Rep. 208, 102 Am. St. Rep. 597; Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192 (under Hill's Ann. Laws, § 2699); Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649. See Hunter v. Cordon, 32 Oreg. 443, 52 Pac. Rep. 182; Osborn v. Logus, 28 Oreg. 302, 319, 38 Pac. Rep. 190, 42 Pac. Rep. 997.

Likewise under Hill's Ann. Code, § 3676, relating to grading, etc., in incorporated cities: Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305.

Contractor as statutory agent of owner: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708, 75 Id. 710.

Contractor and subcontractor not owner's agent to determine the value of materials furnished or labor done: Quackenbush v. Artesian L. Co., 47 Oreg. 303, 83 Pac. Rep. 787 (under Bellinger and Cotton's Ann. Codes and Stats., § 5640). See Cooper M. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649, 60 Id. 1; Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996 (Hill's Ann. Laws, § 3669); Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192.

A subcontractor is one who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708, 75 Id. 710.

It is created for the purpose, not of fixing a personal liability on the owner, but of binding his interest in the property.[8]

§ 575. Same. Statutory provision. Section eleven hundred and eighty-three[9] provides: "Mechanics, . . . shall have a lien . . . for the value of such labor done and ma-

No contractual privity between the owner and subcontractor: Smith v. Wilcox, 44 Oreg. 323, 74 Pac. Rep. 708, 75 Id. 710.

Utah. Materials furnished to agent of owner: See Mammoth M. Co. v. Salt Lake F. & M. Co., 151 U. S. 447, 450, bk. 38 L. ed. 229, 14 Sup. Ct. Rep. 384, **affirming** s. c. sub nom. Salt Lake F. & M. Co. v. Mammoth M. Co., 6 Utah 351, 23 Pac. Rep. 760.

Contract must be made with owner or authorized agent; as, agent, contractor, or otherwise: Eccles L. Co. v. Martin (Utah, Nov. 14, 1906), 87 Pac. Rep. 713, 715; Morrison v. Clark, 20 Utah 432, 59 Pac. Rep. 235.

Washington. Contractor as statutory agent: Seattle L. Co. v. Sweeney (Wash., June 19, 1906), 85 Pac. Rep. 677; Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397, 400 (Ballinger's Ann. Codes and Stats., § 5900). See Collins v. Snoke, 9 Wash. 566, 38 Pac. Rep. 161.

Agency thus established is a purely statutory one, and will not be extended beyond the necessities of the case: Whittier v. Puget Sound L. T. & B. Co., 4 Wash. 666, 30 Pac. Rep. 1094, 31 Am. St. Rep. 944; but in Spokane etc. L. Co. v. McChesney, 1 Wash. 609, 614, 21 Pac. Rep. 198, it was said: "This word 'agent' has an accepted legal and popular meaning, and makes all contracts, notices, and knowledge of the main contractor that of the owner himself. The owner is bound by the acts of his agents. It makes the owner privy with both contractor and subcontractor." Under 1 Mills's Code, § 1663, the owner's material-man was not the "agent" of the owner, within the meaning of the law: Pacific R. M. Co. v. Hamilton, 61 Fed. Rep. 476 (Cir. Ct.), **affirmed** in Pacific R. M. Co. v. James Street Cons. Co., 68 Fed. Rep. 966, 16 C. C. A. 68, 29 U. S. App. 698.

[8] See Reed v. Norton, 90 Cal. 590, 595, 598, 26 Pac. Rep. 767; Booth v. Pendola, 88 Cal. 36, 41, 44, 23 Pac. Rep. 200, 24 Pac. Rep. 714, 25 Pac. Rep. 1101.

New Mexico. But see language of court in Hobbs v. Spiegelberg, 3 N. M. 357, 5 Pac. Rep. 529.

Oregon. See Osborn v. Logus, 28 Oreg. 302, 308, 38 Pac. Rep. 190, 42 Pac. Rep. 997. And thus differs from the agency at the general law, which may impose a personal liability upon the principal: See Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

Washington. See Whittier v. Puget Sound L. Co., 4 Wash. 666, 30 Pac. Rep. 1094, 31 Am. St. Rep. 994.

[9] **Kerr's Cyc. Code Civ. Proc.,** § 1183, as amended March 5, 1903.

Utah. Under Rev. Stats., § 1372, the lessee in possession making improvements under the terms of the lease is not the "agent" of the owner: Morrow v. Merritt, 16 Utah 412, 52 Pac. Rep. 667.

Washington. Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571, 573.

Under 1 Hill's Code, § 1663, the contractor, subcontractor, or other persons enumerated, "to be the agent of the owner of any building or other improvement by virtue of this statute, must be one having charge, in whole or in part, of the construction, alteration, or repair thereof": Pacific R. M. Co. v. Hamilton, 61 Fed. Rep. 476.

Compare, as to architect, Cadwell v. Brackett, 2 Wash. 321, 26 Pac. Rep. 219.

terials furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise; and any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process, has a lien . . . for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owner of such mining claim or claims or real property worked as a mine or of the building, or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or work and labor performed in and about such mining claim or claims, or real property worked as a mine, or the construction, alteration, addition to, or repair, either in whole or in part of any building or other improvement as aforesaid, or of such mining claim or claims, either as lessee or under a working bond or contract therein, with the privilege of purchase, or otherwise, shall be held to be the agent of the owner for the purposes of this chapter."

§ 576. **Same. When contract is void.** When the contract is void, the contractor is, as to other claimants, the agent of the owner.[10] A contract made by the original contractor, as statutory agent, under a void statutory original contract, will not render the owner personally liable to the original contractor's subclaimants.[11]

§ 577. **Person in possession as agent of owner.** One who is in possession of certain premises by the owner's permission, and makes repairs upon a house situated thereon, by the latter's consent, under a verbal agreement with the owner to purchase the premises and pay for the repairs, is the "agent" of the owner, so as to charge the interest of the

[10] Gibbs v. Tally, 133 Cal. 373, 377, 65 Pac. Rep. 970, 60 L. R. A. 815. **Under a void contract, contractor, agent of the owner,** either actually or statutory: See McClain v. Hutton, 131 Cal. 132, 139, 142, 61 Pac. Rep. 273, 63 Id. 182, 622.

[11] McClain v. Hutton, 131 Cal. 132, 144, 61 Pac. Rep. 273, 63 Id. 182, 622.

owner with liens for such repairs.[12] Thus where a certain fixture was sold and delivered to the person having charge and management of a water-works, to be used at the works, without anything being said as to his acting for anybody else, he will be held to have acted for the owners of the property, and their interests therein will be bound by a lien therefor.[13]

§ 578. **Same. Person working mine.** A contract authorizing a person to occupy and hold possession of a mine, and make improvements on it, and do certain work on his own account, does not show that such person was in any manner the agent of the owner, before the amendment of 1903 to section eleven hundred and eighty-three.[14] "The agent referred to in the section must be the agent of the owner of the building, mining, or improvement. And when the statute says that certain persons are 'deemed to be the agent of the

[12] Moore v. Jackson, 49 Cal. 109, 111.

See "Estoppel," §§ 469 et seq., ante.

As to mechanic's lien on landlord's interest created by tenant, see note 6 L. R. A. (N. S.) 485.

In Eaton v. Rocca, 75 Cal. 93, 95, 16 Pac. Rep. 529, it seems that the person who employed the claimant's laborer on a mine had done so without the knowledge of the owner, who had never empowered the employer to act as his superintendent or agent, or held him out as such. The report tends to show that the employer was a mere trespasser. No reference was made to § 1183, Code Civ. Proc., as to the person "having charge" of the mining being the agent of the owner, and it was held that the employer did not act as the agent of the owner; that neither the owner nor his land was bound by the act of such employer, and that the plaintiff had no lien. Where a lessee in possession made a contract with a contractor, it was found that the contractor was the agent of both defendants, but it was held that there was no evidence to justify this finding: See Jones v. Shuey (Cal., April 3, 1895), 40 Pac. Rep. 17.

Arizona. See Eaman v. Bashford, 4 Ariz. 199, 37 Pac. Rep. 24; Gates v. Fredericks, 5 Ariz. 343, 52 Pac. Rep. 1118.

Colorado. The contract may be with an authorized agent of the owner: Williams v. Uncompahgre Canal Co., 13 Colo. 469, 22 Pac. Rep. 806 (Gen. Stats., ch. xv).

Purchaser as implied agent of grantor of deed in escrow, and express agent of the grantee: Chicago L. Co. v. Dillon, 13 Colo. App. 196, 56 Pac. Rep. 989.

Washington. See Kremer v. Walton, 16 Wash. 139, 47 Pac. Rep. 238, s. c. 11 Wash. 120, 39 Pac. Rep. 374.

[13] Goss v. Helbing, 77 Cal. 190, 19 Pac. Rep. 277. It is probable that the owner had knowledge of the management of the works by the purchaser, and is perhaps a case of actual or ostensible agency.

[14] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

owner,' it means the agent of the owner of the building, mining, or other improvement." [15]

Before the amendment of 1907, a person not expressly authorized by the owner of a mine to act in his behalf is not the constructive agent of the owner, unless he is a person having charge of "mining," as previously provided by the statute, that is, doing some work upon the mine itself, for the purpose of extracting ores, and is not merely in possession under a contract by which he was empowered to make improvements and prosecute development-work thereon. He was required to be engaged in the actual work of mining, and the services contracted for by him must have been such as aided in such mining, in order to constitute the person in charge of the mining the agent of the owner to contract for such services, and in order to give a lien therefor against the mining claim.[16]

§ 579. Architect as agent. When an architect has no other authority than is specially conferred upon him by a written

[15] Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 287, 65 Pac. Rep. 578.

Alaska. A mere allegation that plaintiffs erected a structure at the instance of one who was in possession of the land under a contract of purchase with the owner is an insufficient allegation that the same was constructed at the instance of the owner or his agent (under Civ. Code, § 262): Russell v. Hayner, 2 Alas. 703 (Dig.), 130 Fed. Rep. 90, 64 C. C. A. 424.

Arizona. Lease-holder not the agent of the lessor, under Rev. Stats., § 2280: Gates v. Fredericks, 52 Pac. Rep. 1118. See Bogan v. Roy, 86 Pac. Rep. 13, 15 (lessee of mine); Walter C. Hadley Co. v. Cummings, 7 Ariz. 258, 64 Pac. Rep. 443 (mill and hoisting-works); Griffin v. Hurley, 7 Ariz. 399, 65 Pac. Rep. 147.

Colorado. A vendor required to make improvements on the property, agent of the vendor: See Antlers Park R. M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226; Shapleigh v. Hull, 21 Colo. 419, 41 Pac. Rep. 1108; Colorado I. W. v. Taylor, 12 Colo. App. 451, 55 Pac. Rep. 942; Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612; Little Valeria G. M. & M. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. Rep. 970.

Washington. The lessee is not the agent of the owner, within the statute; but otherwise where a lease contains provisions, in the nature of a building contract, authorizing the lessee to proceed with the construction of a building: Stetson-Post M. Co. v. Brown, 21 Wash. 619, 59 Pac. Rep. 507, 75 Am. St. Rep. 862; Kremer v. Walton, 11 Wash. 120, 39 Pac. Rep. 374.

[16] Williams v. Hawley, 144 Cal. 97, 103, 77 Pac. Rep. 762. See Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 287, 65 Pac. Rep. 578.

New Mexico. Foreman in charge of mining, agent of the owner: Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087 (under Comp. Laws 1897, § 2217).

contract for the construction of a building, and such authority consists merely in seeing that the building is properly constructed according to the drawings and specifications, to certify to that effect, to sign and issue certificates for progress payments, and to decide any dispute which may arise respecting the true construction and meaning of the drawings and specifications, there is no authority conferred upon the architect to receive notice of an assignment of the contract, such as would create constructive notice to the owner of the building thereby.[17]

§ 580. **Presumption of agency raised.** The provision of the statute under discussion only raises a presumption of agency, which may be rebutted.[18] Thus where the president of a corporation which owned the land visited the premises while certain repairs were going forward, and was then informed thereof, the corporation is prima facie charged with knowledge of the fact that the work was being done.[19]

A person claiming to be the agent, and acting on the land as the agent, of the owner may bind the land and the interest of the owner, on the principle of estoppel;[20] but if the owner

[17] Renton v. Monnier, 77 Cal. 449, 19 Pac. Rep. 820.

See 1 Am. & Eng. Ann. Cas. 950.

Idaho. Architect as agent of the owner: See Huber v. St. Joseph's Hospital, 11 Idaho 631, 83 Pac. Rep. 768.

Oregon. Architect as agent of owner to procure and approve bond: See Wollenberg v. Sykes (Oreg.), 81 Pac. Rep. 148, 150.

Washington. The mere fact that an architect was directed by the owner to go with the contractor and get a bond to be executed by the contractor did not authorize the architect to make any change in the contract: Sweeney v. Ætna I. Co., 34 Wash. 126, 74 Pac. Rep. 1057.

[18] Donohoe v. Trinity Consol. Co., 113 Cal. 119, 123, 45 Pac. Rep. 259; Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83.

See "Evidence," §§ 779 et seq., post.

Evidence of agency: See Linck v. Johnson, 134 Cal. xix, 66 Pac. Rep. 674.

Oregon. Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454. See Allen v. Rowe, 19 Oreg. 188.

See §§ 469 et seq., ante, and Cross v. Tscharnig, 27 Oreg. 49.

Washington. Agency a question of fact for the jury: Novelty M. Co. v. Heinzerling, 39 Wash. 244, 81 Pac. Rep. 742.

[19] Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 338. But see Ayers v. Green Gold M. Co., 116 Cal. 333, 336, 48 Pac. Rep. 221.

Washington. See Novelty M. Co. v. Heinzerling, 39 Wash. 244, 81 Pac. Rep. 742.

[20] See "Estoppel," §§ 469 et seq., ante.

Oregon. Compare: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390.

shows want of knowledge, and non-employment of the alleged agent, with a showing that he had exercised ordinary care in the premises, his interest is not bound;[21] and knowledge by the claimant that the alleged agent had no authority to act for the owner will prevent the lien from coming into existence.[22]

§ 581. Undue extension to statutory agency of rules applicable only to common-law agency. The doctrine of statutory agency seems, in a recent case,[23] however, to have been carried beyond the limits to which it was brought by the former decisions, which practically only furnish a rule of evidence, namely, a presumption; for it has been held that where a contractor (who deals at arm's-length with the owner of the building, there being no relation of trust between them in the particular case) buys material and sues for a balance upon a quantum valebat, the contractor could not contract to pay one price for his articles purchased and

[21] Donohoe v. Trinity Consol. Co., 113 Cal. 119, 123, 45 Pac. Rep. 259. See Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83.

See "Constitutional Aspects," §§ 28 et seq., ante.

Idaho. A person unlawfully in possession is not the agent of the owner: Idaho G. M. Co. v. Winchell, 6 Idaho 729, 59 Pac. Rep. 533, 96 Am. St. Rep. 290.

New Mexico. See Post v. Miles, 7 N. M. 317, 325, 335, 34 Pac. Rep. 586.

Oregon. And so a mere stranger, who, by fraudulent representations that he is the owner, induces a material-man to deliver material to the contractor, who is not a party to the fraud, cannot bind the owner as agent (under Hill's Code, § 3669): Sellwood L. Co. v. Monnell, 26 Oreg. 267, 38 Pac. Rep. 66.

[22] Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83; Ayers v. Green Gold M. Co., 116 Cal. 333, 336, 48 Pac. Rep. 221.

Montana. So of a hiring by a partner, when claimant knew that the agreement had to be ratified by the other partners: Nolan v. Lovelock, 1 Mont. 224.

[23] Kuhlman v. Burns, 117 Cal. 469, 49 Pac. Rep. 585 (void statutory original contract). There does not appear to be any reason why a contractor, who holds no relation of trust to the owner, could not, in suing on the implied contract, take advantage of a cheap purchase of materials by himself, although the price paid may be some evidence of the value. This doctrine leads logically to the result that no contractor should be permitted to make a profit on his contract. Of course, where the original contractor is in reality an "agent" of the owner, as where the contract is to superintend the construction on a percentage basis, a relation of trust exists: See Booth v. Pendola, 88 Cal. 36, 41, 45, 23 Pac. Rep. 200, 24 Id. 714, 25 Id. 1101.

See also §§ 118 et seq., ante.

then subject the defendant to pay him a larger price for the same articles, since, as it was said, the contractor was the "agent" of the owner, under section eleven hundred and eighty-three of the Code of Civil Procedure.[24]

§ 582. **Personal liability of agent.** An express or actual agent of the owner is not personally liable to the claimants, under the general principles of the law of agency.[25] But, under the provision creating the statutory agency, the statutory agent may, under the general rules of law, be personally liable to his subclaimants.[26]

§ 583. **Agency to receive notice of claims of subclaimants.** Besides the statutory agency to bind the owner's interest in the land by persons "having charge" of the work, discussed above, section eleven hundred and eighty-five[27] provides another species of agency, of a passive nature, to bind the owner, by receiving notice of claims of subclaimants.[28]

§ 584. **Principal bound by notice to agent.** The rule is well settled that notice to an agent of facts arising from or connected with the subject-matter of the agency is constructive notice to the principal, when the notice comes to the agent while he is concerned for the principal, and in the course of the very transaction; but notice to an agent of facts not arising from or connected with such subject-matter is not notice to the principal, unless actually communicated to him.[29]

[24] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[25] Eaton v. Rocca, 75 Cal. 93, 97, 16 Pac. Rep. 529; McIntyre v. Trautner, 63 Cal. 429, 431.

Agent not personally liable: See Schindler v. Green (Cal. App., Aug. 14, 1905), 82 Pac. Rep. 341, and see s. c. 149 Cal. 752, 82 Pac. Rep. 631.

[26] See "Original Contractor," §§ 55, 65, ante.

[27] **Kerr's Cyc. Code Civ. Proc.,** § 1185.

[28] See "Notice," §§ 547 et seq., ante.

Kerr's Cyc. Code Civ. Proc., § 1187, provides for the occupation and use of a building by the owner's "representative" and the acceptance thereof by his "agent." See "Completion," §§ 334 et seq., ante.

[29] Renton v. Monnier, 77 Cal. 449, 19 Pac. Rep. 820. See **Kerr's Cyc. Civ. Code,** § 19, and note pars. 26, 27.

CHAPTER XXIX.

THIRD PERSONS.

§ 585. Scope of discussion.
§ 586. Purchasers and other lien-holders.
§ 587. Same. Defective claim of lien as notice to bona fide third parties.
§ 588. Assignees. Assignment of inchoate right to lien.
§ 589. Same. Formalities of assignment.
§ 590. Same. Unaccepted order.
§ 591. Same. Assignment of debt necessary.
§ 592. Same. Separate assignments of debt and security.
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§ 598. Same. Assignment to surety on contractor's bond.
§ 599. Same. Insolvency. Bankruptcy.
§ 600. Same. Premature payments.
§ 601. General creditors. Claimants losing lien.
§ 602. Same. Attachment or process. Materials.
§ 603. Same. Garnishment.
§ 604. Mortgagees. Obligation to advance moneys for construction.

§ 585. Scope of discussion. In this and the following chapter we shall briefly consider the rights and obligations of those who are not lien claimants, but who derive rights or have duties imposed upon them through lien-holders, such as assignees and sureties, and also the rights and obligations of general creditors of those who are affected by the mechanic's-lien statute.

§ 586. Purchasers and other lien-holders. The rights of lien-holders, other than claimants, have been considered to some extent elsewhere.[1] It has already been shown that persons dealing with the property during the progress of the

[1] See "Priorities," §§ 487 et seq., ante; and "Divestment of Lien," §§ 627 et seq., post.

work are charged with notice of the claims of mechanics,[2] and that purchasers take the property subject to such claims.[3] Reference is made to another part of this work for a detailed discussion of this subject.

§ 587. Same. Defective claim of lien as notice to bona fide third parties. Section twelve hundred and three a, which is a new section added to the Code of Civil Procedure in 1907, provides that the lien is not invalidated unless an innocent third party without notice, direct or constructive, has, since the claim was filed, become the bona fide owner of the property liened upon, and the notice of claim was so deficient that it did not put the party upon further inquiry in any manner.[4]

§ 588. Assignees.[5] Assignment of inchoate right to lien. It has been shown that the right to create a lien on the prop-

[2] Crowell v. Gilmore, 13 Cal. 54, 56.

[3] See § 490, ante.

[4] **Kerr's Cyc. Code Civ. Proc.,** § 1203a; **Kerr's Stats. and Amdts. 1906-07,** p. 482.

See "Mistake and Error in Claim," §§ 412 et seq., ante.

[5] **As to assignability of a mechanic's lien,** see notes 11 L. R. A. 740; 13 L. R. A. 704; 42 Am. St. Rep. 530.

See § 23, ante.

Construction of assignment "subject to conditions of original contract": See Pacific R. M. Co. v. English, 118 Cal. 123, 129, 50 Pac. Rep. 383.

Reassignment to claimant of assigned claim: See Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

Failure to give notice of assignment, owing to confidence in assignor: See Renton v. Monnier, 77 Cal. 449, 19 Pac. Rep. 820.

Claim, under Kerr's Cyc. Code Civ. Proc., § 1203, subsequently declared unconstitutional, for damages against owner of property failing to take bond from contractor, within **Kerr's Cyc. Code Civ. Proc.,** § 1458, declaring that a right arising out of an obligation is the property of the person to whom it is due, and may be transferred as such: See Gibbs v. Tally (Cal., Dec. 22, 1900), 63 Pac. Rep. 168, **reversed** 133 Cal. 373, 65 Pac. Rep. 970.

See "Constitutional Aspects," § 39, ante.

Colorado. Assignee of judgment: Empire L. & C. Co. v. Engley, 18 Colo. 388, 33 Pac. Rep. 153.

Assignment of prior mechanic's lien to subsequent mortgagee: Fitch v. Stallings, 5 Colo. App. 106, 38 Pac. Rep. 393.

Assignee of owner's laborer: Hanna v. Savings Bank, 3 Colo. App. 28, 31 Pac. Rep. 1020.

Pleading assignment of claim: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 54; Rialto M. & M. Co. v. Lowell, 23 Colo. 253, 47 Pac. Rep. 263.

erty, or on the fund, is personal in California, and hence assignees have no right to perfect such liens, the lien being not yet in existence, although it is a general rule that the assignment of a debt carries with it the lien by which it is secured.[6] But the sale of the interest in a contract, by a partner to his copartners, is not within the rule that the right to create a lien cannot be assigned to a stranger to the transaction.[7]

After the lien is perfected, it may be assigned, and the assignee may foreclose the lien.[8]

§ 589. **Same. Formalities of assignment.** The assignment of a mechanic's lien, such lien being a charge upon the

Nevada. Lien may be assigned: Skyrme v. Occidental M. Co., 8 Nev. 219.

Oregon. See Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

Owner, as assignee of the claim, will not be limited to the amount paid for the lien, if less than the face value, but may enforce it to the extent to which his assignor could do so: Id.

Utah. Assignee of lien may foreclose: Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85 (1896).

Washington. Supplemental pleadings (assignee pendente lite): See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 721.

[6] Mills v. La Verne L. Co., 97 Cal. 254, 256, 32 Pac. Rep. 169, 33 Am. St. Rep. 168; McCrea v. Johnson, 104 Cal. 224, 225, 37 Pac. Rep. 902; Rauer v. Fay, 110 Cal. 361, 42 Pac. Rep. 902; Rauer v. Welsh (Cal., Dec. 10, 1895), 42 Pac. Rep. 904. But see Duncan v. Hawn, 104 Cal. 10, 14, 37 Pac. Rep. 626 (under threshing-machine act, which does not require any act of claimant to perfect lien); Simons v. Webster, 108 Cal. 16, 19, 40 Pac. Rep. 1056 (filing claim by surviving partners).

See "General Nature of Lien," § 9, ante; "Notice," §§ 547 et seq., ante.

Under the act of April 26, 1862, § 5, the assignee of the laborer, etc., could give notice to the owner. It was claimed in Beatty v. Mills, 113 Cal. 312, 313, 45 Pac. Rep. 468, that an assignment of a claim for street-work, under **Kerr's Cyc. Code Civ. Proc.,** § 1191, under a private contract, when the assignee filed the claim, rendered the lien invalid, but the point was not decided by the court.

Montana. Mason v. Germaine, 1 Mont. 263, 272 (1865).

Oregon. Brown v. Harper, 4 Oreg. 89 (decided in 1870).

[7] Simons v. Webster, 108 Cal. 16, 19, 40 Pac. Rep. 1056.

Assignment of debt from partnership to one partner: See Gray v. Wells, 118 Cal. 11, 17, 50 Pac. Rep. 23.

See "Nature of Lien," § 9, ante; "Claimants," §§ 42 et seq., ante.

[8] Duncan v. Hawn, 104 Cal. 10, 14, 37 Pac. Rep. 626. See Marchant v. Hayes, 120 Cal. 137, 138, 52 Pac. Rep. 154.

See "General Nature of Lien," § 9, ante; and Ritter v. Stevenson, 7 Cal. 388, 389.

Montana. Davis v. Bilsland, 85 U. S. (18 Wall.) 659, bk. 21 L. ed. 969.

Oregon. Brown v. Harper, 4 Oreg. 89.

land, can only be made in writing.[9] A mere signing of the written assignment by the assignor, without delivery thereof to the assignee, is ineffectual to vest title to the sum assigned in the assignee.[10]

Copartnership claim. Where a claim of lien is filed by a copartnership, and the account and lien are assigned in writing, made by one of the partners, in the name of the partnership, to himself individually, such assignment is sufficient, so far as the owner is concerned, especially where the other members of the firm raise no objection to the assignment.[11]

§ 590. Same. Unaccepted order. Where it is plainly apparent from the evidence that the plaintiff was the assignee and owner of the contractor's claim, an unaccepted order, previously given by the contractor in favor of the plaintiff for such claim, does not amount to an assignment of the same, nor in any way affect the subsequent assignment of the whole claim to the plaintiff after the claim of lien was filed, and where the plaintiff testifies that there was no assignment to him, but a mere order, his statement ought to control, as the plaintiff is the only one who could be injured by holding that the order was not an assignment.[12]

[9] Ritter v. Stevenson, 7 Cal. 388, 389. See **Kerr's Cyc. Civ. Code,** § 1091, and note; and **Kerr's Cyc. Code Civ. Proc.,** §§ 1971, 1973, and notes.

Colorado. See Small v. Foley, 8 Colo. App. 446, 47 Pac. Rep. 64 (1889).

[10] Ritter v. Stevenson, 7 Cal. 388, 389.

Assignment of lien. Necessity for writing: See Curnow v. Happy Valley Blue Gravel & H. Co., 68 Cal. 262, 264, 9 Pac. Rep. 149; Patent Brick Co. v. Moore, 75 Cal. 205, 211, 16 Pac. Rep. 890.

Oregon. Where the parties to an assignment testify that it was intended to assign the lien so as to foreclose several liens in the same suit, the writing purporting to assign "our claim" against a person designated, and being made after the filing of the claim of lien, and prior to the commencement of the action, the assignment is good, as far as the owner is concerned: Nottingham v. McKendrick, 38 Oreg. 495, 63 Pac. Rep. 822, 57 Id. 195.

[11] Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 570, 42 Pac. Rep. 154.

[12] Wyman v. Hooker, 2 Cal. App. 36, 41, 83 Pac. Rep. 79.

Assignment. Effective when. Assignment made by contractor of amount due under contract for public building not effective until approval of estimates by superintendent, as required by contract, nor until final completion and acceptance of the work: See Newport W. & L. Co. v. Drew, 125 Cal. 585, 58 Pac. Rep. 187.

§ 591. Same. Assignment of debt necessary. The lien will not pass, except by a transfer of the account; and where the account was assigned with a verbal understanding that in case the assignee collects it, he will credit his claim with a portion thereof and return the balance to the assignor, and if nothing is received no sum is to be credited, it was held that the assignment was void, and that the assignee could not sue thereon in his own name.[13]

§ 592. Same. Separate assignments of debt and security. Where a note is assigned to one person, and the money due from the owner to the contractor is assigned to another person as security therefor, the latter holds the security as pledge-holder and trustee for the assignee of the note, and the former can and should enforce the collateral security for the benefit of his principal or assignee of the note, and the latter is, by equitable assignment, owner of the security.[14]

Title of assignee of security. Right to enforce. The person holding the security under such circumstances either takes the legal title of the security as pledge-holder or trustee for the assignee of the note, or takes no title whatever. The assignment of moneys due cannot be used by the holder for his own benefit, but for that of the owner of the note, who can, as equitable assignee of the security, enforce the same, whether its holder takes title thereof or not.[15]

§ 593. Same. Splitting demands. It is not permissible for the building contractor to split his demand against the

[13] Ritter v. Stevenson, 7 Cal. 388, 389.

Colorado. Assignment of a claim carries with it both the debt and the right to lien: Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. Rep. 350, s. c. sup. ct. 86 Pac. Rep. 1045 (under Mills's Ann. Stats., § 2872e, 2d ed., § 2894); and see Sprague I. Co. v. Mouat L. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 182 (1883, 1889); Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 54.

Wyoming. Assignment of debt carries with it every right and security available to the assignor as incident thereto; and as against one who is given a lien upon property to secure a debt, due or to become due, it is not necessary, in a suit to foreclose the lien, to allege ownership of the property in the debtor: Ramsey v. Johnson, 8 Wyo. 476, 58 Pac. Rep. 755, 80 Am. St. Rep. 948 (not a mechanic's-lien case).

[14] Perry v. Parrott, 135 Cal. 238, 243, 67 Pac. Rep. 144.

[15] Perry v. Parrott, 135 Cal. 238, 243, 67 Pac. Rep. 144.

employer, and, by assignment of a portion thereof, impose upon the latter, without his consent, the legal obligation of paying the assignee.[16] But the rule is otherwise if the owner promises to pay the contractor's orders.[17]

§ 594. **Same. Notice of assignment.** When the owner pays to the contractor moneys due under the original contract, before the former has notice of an earlier assignment of the contract, the owner is not liable to the assignee for the amount paid.[18]

Notice to one who does not understand the English language. When a contract is assigned, and one who cannot read nor write English is given notice thereof by simply being shown the notice written in English, without its being read to him or left with him, the notice given, in order to be effectual, should be sufficiently precise and complete enough to put the defendant fully on his guard as to the fact of such assignment, and he should understand it.[19]

Questions of fact. Whether, under the circumstances, the notice was given or not, and if given, whether the defendant understood it, and it was sufficient to put him on his guard, or in the language of the code, to put a prudent man on inquiry, are questions of fact.[19]

§ 595. **Same. General rights of assignee.** Generally speaking, the assignee has no higher rights than his assignor had.[20] Thus, under a statutory original contract, where the original contractor makes an assignment of moneys due from the owner before the completion of the work, it vests in the assignee, prior to the expiration of thirty-five days from the date of the completion of the contract, no rights in any wise

[16] Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394; Pacific R. M. Co. v. English, 118 Cal. 123, 131, 50 Pac. Rep. 383.
See § 533, ante.

[17] Adams v. Burbank, 103 Cal. 646, 649, 37 Pac. Rep. 640; Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394.
See § 593, ante.

[18] Renton v. Monnier, 77 Cal. 449, 19 Pac. Rep. 820.

[19] Renton v. Monnier, 77 Cal. 449, 19 Pac. Rep. 820.

[20] Pacific R. M. Co. v. English, 118 Cal. 123, 128, 50 Pac. Rep. 383. See Johnson v. La Grave, 102 Cal. 324, 326.
See "Notice," §§ 547 et seq., ante.

different from or superior to those of the original contractor.[21]

Release prior to assignment. The assignee of an original contract, who performs work under it, takes it subject to the equities of third parties, and a writing, executed by the original contractor, releasing the owner from all claims under the contract, is admissible in evidence, although the assignee was unaware of such release when he took the assignment.[22]

Latent equities. It has been held that the assignee of a thing in action, who purchases for value, in good faith, takes it not subject to the latent equities of third persons of which he had no notice,[23] but the assignment is subject to equities in favor of the debtor.

Cutting off rights of subclaimants. It has likewise been held that an assignment of the contract price, or the balance thereof, with notice of such assignment to the owner after the balance was due and payable under the terms of the original contract, cuts off all rights of lien claimants in the fund so assigned, and any notice afterwards given by such claimant is futile, provided the assignee took such assignment for value, and without notice of the unpaid demand of the claimant.[24] In the case of statutory original contracts, however, this rule is subject to the limitations imposed upon the final payment of twenty-five per cent, already considered in some detail.[25]

[21] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 63, 40 Pac. Rep. 45. See Pohlman v. Wilcox, 146 Cal. 440, 80 Pac. Rep. 625.

See "Notice," §§ 547 et seq., ante.

[22] Rauer v. Fay, 110 Cal. 361, 42 Pac. Rep. 902; Rauer v. Welsh (Cal., Dec. 10, 1895), 42 Pac. Rep. 904.

Washington. Waiver of right to lien by contractor prior to assignment thereof prevents assignee from enforcing lien: Kent L. Co. v. Ward, 37 Wash. 60, 79 Pac. Rep. 485.

[23] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 62, 64, 40 Pac. Rep. 45. See Wright v. Levy, 12 Cal. 257.

See **Kerr's Cyc. Code Civ. Proc.,** §§ 368, 440, and notes; **Kerr's Cyc. Civ. Code,** § 1459, and note.

See §§ 547 et seq., ante, and § 561, ante.

[24] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 62, 64, 40 Pac. Rep. 45.

See §§ 547 et seq., ante. See also **Kerr's Cyc. Civ. Code,** § 1459, and note.

[25] See §§ 274 et seq., and §§ 541, 563, ante.

§ 596. **Same. Conditional acceptance.** Where a subcontractor assigns all his interest in the last payment to be made to him by the original contractors under his subcontract for certain work on a structure, and such contractors promise to pay a certain sum on his orders when it should become due to him, and to hold it out of the last payment due to such subcontractor, the assignee cannot recover the amount assigned from the contractors, if the subcontractor does not perform his contract, and abandons it, as the promise is not absolute, but conditional upon the subcontractor's performance of his contract.[26] And when the contractor, upon failure of the subcontractor to carry out such contract, completes the same at more than the subcontract price, such agreement for conditional payments cannot have the effect of rendering the conditional promise absolute, nor in any way affect the assignee of the subcontractor in the last payment.[27]

§ 597. **Same. Defenses arising subsequent to assignment.** Where trustees enter into a contract to build a schoolhouse, and issue an order to pay instalments payable to the contractor, and the architect makes an estimate, upon which the order was made, and the auditor was required to draw his warrant therefor upon the requisition of the county superintendent, and the order was assigned by the contractor in satisfaction of a prior debt in part, and as to the remainder for cash before notices of certain claims were served, equities or defenses not existing when the order was assigned and presented for a warrant for payment do not affect the assignee, nor do any equities subsequently arising against the contractor in favor of the school district.

Thus where the school district receives notice of subclaimants' demands after the assignment and presentation of such order, no liability is incurred by the district, nor is its liability increased under the contract; nor are the rights of the assignee affected thereby; and such assignee may demand payment, whenever there are funds applicable

[26] Pohlman v. Wilcox, 146 Cal. 440, 442, 80 Pac. Rep. 625.
[27] Pohlman v. Wilcox, 146 Cal. 440, 442, 80 Pac. Rep. 625.

thereto, where the contractor subsequently commits a breach of the contract, even if increased expense is thereby incurred by the school district to complete the contract.[28]

§ 598. **Same. Assignment to surety on contractor's bond.** The subject of the rights of sureties on the original contractor's bond will be considered in the following chapter, and their right to claim a lien, it will be observed, has been questioned. According to the general doctrine relative to sureties in California, it is held that while an assignment of a claim of lien to a surety on a contractor's bond that no lien should be filed does not estop the assignee from suing on the claim,[29] yet he is under a legal obligation not to enforce a lien, which may be urged as a set-off or counterclaim.

§ 599. **Same. Insolvency. Bankruptcy.** Where the original contractor becomes insolvent, the mere presentation of a note made by him, and assigned by the payee to another person, the payee having also assigned the moneys due under a building contract, as security to the payee, and the payee having assigned such moneys to a further party, the mere presentation of the note is an unsecured claim against the estate of the insolvent, and the rejection of it, as having been secured by the assignment of the moneys due on the building contract, without further effort to enforce the note against the estate of the insolvent contractor, cannot preclude the enforcement, by the holder of the note, of the security of the contractor's demand against the owner of the building.[30]

[28] Long Beach School Dist. v. Lutge, 129 Cal. 409, 62 Pac. Rep. 36.

Assignment of public contract, with consent of surety and municipality, not valid without consent of parties entitled to sue upon bond: See French v. Powell, 135 Cal. 636, 642, 68 Pac. Rep. 92.

[29] Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

See "Sureties," §§ 605 et seq., post.

Hawaii. Assignment to material-man, by contractor, of all moneys payable under the contract, accepted by the owner, "subject to all the conditions of the contract," does not estop the material-man from enforcing a lien; the contract not being assigned, but only moneys payable under it, and the action being for the enforcement of a lien under the statute, and not for moneys payable under the terms of the contract: Allen v. Redward, 10 Hawn. 151, 157.

[30] Perry v. Parrott, 135 Cal. 238, 244, 67 Pac. Rep. 144.

Assignee of note of contractor filing claim with assignee in insolvency: See Perry v. Parrott, 135 Cal. 238, 67 Pac. Rep. 144.

§ 600. **Same. Premature payments.** Premature payments amount to nothing, under certain circumstances, as against subclaimants, but, under other circumstances, or against other persons, such as assignees, they are payments in every sense of the word,[31] and the general principles of law relating to assignments apply in such cases.

§ 601. **General creditors. Claimants losing lien.** This section and those following relate to the persons who have no lien upon the property or upon the fund. Where lien claimants are not entitled to enforce a lien upon the building, by not filing their claims of lien in time, or otherwise, they stand upon the same footing as general creditors,[32] and it is immaterial to them, and likewise to their assignees, whether any portion of the moneys due under the original contract was unpaid at the time the contractor abandons the contract, nor is it any concern of theirs whether a proper disposition of the unpaid portion of the contract price was made by the owner.[33] They are not concerned with the correctness or incorrectness of the findings of the court as to the liens of other plaintiffs, either in the lower court, or upon appeal from a personal judgment in their favor against the contractor.[34]

A contractor's trustee in bankruptcy, and the contractor's general assignee for the benefit of his creditors, so far as mechanics' liens are concerned, are alike: In re Grissler, 136 Fed. Rep. 754, 69 C. C. A. 406.

As to the liens mentioned in the bankruptcy act, giving higher rights to the trustee than to the bankrupt, mechanics' liens perfected by proper filing of the claim therefor, even if within four months of the commencement of bankruptcy proceedings, are not included: In re Grissler, 136 Fed. Rep. 754, 69 C. C. A. 406 (act July 1, 1898, ch. dxli, § 67; 30 Stats. at L. 564; U. S. Comp. Stats. 1901, p. 3449; Fed. Stats. Ann., p. 688).

Construction given by state courts as to preferential statutory claims, under statute for assignment for the benefit of creditors: See In re Grissler, 136 Fed. Rep. 754, 69 C. C. A. 406, and In re Roeber, 121 Fed. Rep. 449, 57 C. C. A. 565, 9 Am. Bank. Rep. 303.

Bankruptcy. Buildings in course of erection by bankrupt. Lien claimants considered, in so far as they affect amounts due from owners to bankrupt: See In re Hobbs & Co. (D. C., W. Va.), 145 Fed. Rep. 211.

[31] Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. Rep. 512.

[32] Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 234, 39 Pac. Rep. 758.

[33] Johnson v. La Grave, 102 Cal. 324, 326, 36 Pac. Rep. 651.

[34] Kennedy & Shaw L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336.

See "Appeal," § 982, post.

Balance of fund after satisfaction of liens. While they may recover a personal judgment against the contractor to whom they furnished the materials,[35] yet they cannot recover a judgment that the amount remaining due to the contractor from the owner, after all lien claims are satisfied, shall be distributed between them.[36]

A judgment against the original contractor, in favor of a claimant who had filed no claim of lien, providing that such claimant is entitled to have the debt satisfied out of any "residue" that may appear in the hands of the owner, and from the product of the sale of the property, after all lien claims have been satisfied, is erroneous, in so far as it directs such payment; and if the word "residue" means surplus moneys due from the owner to the contractor after payment of all liens, this, also, is objectionable.[37]

Judgment against owner. General creditors are not entitled to a judgment for the unpaid portion of the purchase price against the owner;[38] nor, in an action for the foreclosure of mechanics' liens, have they any recourse against the owner's property; nor, in the absence of privity, any personal judgment against him.[39]

Such persons are not deemed included in an offer of the owner to pay the amount due the contractor to the persons claiming to be lien-holders in proportion to their respective claims whenever the respective amount due to each lien-holder is determined.[40]

[35] Kennedy & Shaw L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336; Kennedy & Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

[36] Kennedy & Shaw L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336, 337.

[37] Hampton v. Christensen, 148 Cal. 729, 740, 84 Pac. Rep. 200.

[38] Kennedy & Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

[39] Kennedy & Shaw L. Co. v. Priet, 115 Cal. 98, 99, 46 Pac. Rep. 903. And see Kennedy & Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

[40] Kennedy & Shaw L. Co. v. Priet, 115 Cal. 98, 99, 46 Pac. Rep. 903. See Kennedy & Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

Utah. A mechanic's lien which has attached is not affected by Sess. Laws 1892, ch. xxx, giving certain laborers a preferred claim upon attachment, etc.: Salt Lake L. Co. v. Ibex M. & S. Co., 15 Utah 440, 49 Pac. Rep. 768, 62 Am. St. Rep. 944.

§ 602. **Same. Attachment or process. Materials.** Section eleven hundred and ninety-six[41] provides: "Whenever materials shall have been furnished for use in the construction, alteration, or repair of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase-money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement."

§ 603. **Same. Garnishment.** It has been seen that a general creditor of the contractor who garnishes money due the contractor in the hands of the owner does not gain priority over the claimant, who, after such garnishment, serves notice on the owner of his claim for labor and materials, which relates back to a time prior to the garnishment.[42]

Where the subcontractor's material-man garnishes moneys due from the contractor to the subcontractor, and the contractor pays to the sheriff the amount due by him to the subcontractor, the material-man can make no further demand upon the contractor.[43]

Garnishment subsequent to lien. Where the garnishment of the general creditor is subsequent to the lien of claimant, and the owner appears in answer to the notice of garnishment and states that the claimant has filed a lien which has priority over the garnishment, the court should either discharge the owner from liability under the garnishment, or postpone decision until the claim of claimant is enforced,

[41] **Kerr's Cyc. Code Civ. Proc.,** § 1196. See Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 353.

See "Provisional Remedies," §§ 645 et seq., post.

Washington. See Potvin v. Denny H. Co., 37 Wash. 323, 79 Pac. Rep. 940.

[42] See "Priorities," §§ 486 et seq., ante; Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536. This case differs from Kennedy & Shaw L. Co. v. Priet, 115 Cal. 98, 99, 46 Pac. Rep. 903, 113 Cal. 291, 45 Pac. Rep. 336, and Kennedy & Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008, in that there was no garnishment in the latter cases.

[43] Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. Rep. 442.

and then any remainder in the hands of the owner will be justly subject to the claim of the garnishing creditor.[44]

§ 604. **Mortgagees. Obligation to advance moneys for construction.** The priority of a mortgage for future advances, executed by the owner for the purpose of securing money to erect a structure, has already been discussed.[45] As between the mortgagee and the mortgager, however, there is a marked distinction, recognized by the cases, between a payment of future advances which are optional with the mortgagee, and those which are obligatory for a definite sum agreed upon, for a sufficient consideration.[46] Where a deed of trust or mortgage and a note of the owner are given to a mortgagee, they are sufficient consideration for a loan agreed upon, and the mortgagee is under an enforceable obligation to furnish the money as agreed.[47]

[44] Tuttle v. Montford, 7 Cal. 358, 360 (1855). In Board of Education v. Blake (Cal.), 38 Pac. Rep. 536, the court ordered the balance of the money after satisfying the liens to be paid over to the garnishing creditor, who had been interpleaded.

See "Priorities," §§ 486 et seq., ante.

[45] See "Priorities," §§ 486 et seq., ante.

"Lien secured by mortgage, deeds of trust, or otherwise, for advances made or to be made for the construction of a building or other improvement on land, is ordinarily superior to a mechanic's lien subsequently attaching, although some of the money may have been advanced after the mechanic's lien attached": Valley L. Co. v. Wright, 2 Cal. App. 288, 293, 84 Pac. Rep. 58. See Platt v. Griffith, 27 N. J. Eq. 207; Mutual L. Ins. Co. v. Walling, 51 N. J. Eq. 99, 26 Atl. Rep. 453.

[46] Valley L. Co. v. Wright, 2 Cal. App. 288, 291, 84 Pac. Rep. 58.

This distinction is stated in Savings & L. Soc. v. Burnett, 106 Cal. 514, 532, 533, 39 Pac. Rep. 922, wherein the court seems to regard Tapia v. Demartini, 77 Cal. 383, 19 Pac. Rep. 641, 11 Am. St. Rep. 288, as stating the rule as to optional advances, as also does Hall v. Glass, 123 Cal. 500, 56 Pac. Rep. 336, 69 Am. St. Rep. 77.

Money loan association has agreed to furnish, and for which a note and mortgage has been given, in no proper sense can be said to be future advances, as advances are regarded in the cases: Valley L. Co. v. Wright, supra.

[47] Valley L. Co. v. Wright, 2 Cal. App. 288, 291, 84 Pac. Rep. 58.

See §§ 497 et seq., ante.

Washington. Home S. & L. Assoc. v. Burton, 20 Wash. 688, 56 Pac. Rep. 940, cited as authority for ruling in Valley L. Co. v. Wright, supra.

Where mortgagee receives conveyance of mortgaged premises under an agreement that the lien shall remain intact, there is no merger; and hence general laborers' liens covering all the property of the company, acquired after the execution of such mortgage, did not take precedence of the mortgage lien, as the law is well settled that there is no merger of the mortgage when the mortgager conveys to the mortgagee, as against subsequent encumbrancers, where it would be inequitable, or where the intention of the parties was otherwise: Fitch v. Applegate, 24 Wash. 25, 64 Pac. Rep. 147.

CHAPTER XXX.

THIRD PERSONS (CONTINUED). SURETIES.

§ 605. Scope of chapter.
§ 606. Statutory requirement of contractor's bond.
§ 607. Same. Application of provision.
§ 608. Statutory bond. Formalities.
§ 609. Same. Statutory bond void.
§ 610. Same. Contract void. Bond valid.
§ 611. Same. Liability on statutory bond.
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§ 613. Common-law bonds. Formalities.
§ 614. General rule of surety's liability.
§ 615. Original contract as basis of liability.
§ 616. Auditing accounts, as provided in contract.
§ 617. Construction of bond.
§ 618. Surety's rights. Notice.
§ 619. Surety as lien claimant.
§ 620. Surety under legal obligation not to foreclose lien.
§ 621. Obligee of bond destroying security of surety.
§ 622. Premature payments. Generally.
§ 623. Same. Intermediate instalments.
§ 624. Same. Final instalment.
§ 625. Liability of sureties. Damages.
§ 626. Bond of contractor on public work.

§ 605. Scope of chapter.[1] The general subject of suretyship will not be considered herein, but the title will be

[1] See "Bond," §§ 281 et seq., ante; "Appeal," §§ 971 et seq., post; "Cumulative Remedies," § 638, post.

Surety finishing building after abandonment: See Green v. Clifford, 94 Cal. 49, 29 Pac. Rep. 331.

Liability of sureties on contractor's bond to laborers and materialmen not entitled to a lien, when bond conditioned against liens or claims: See note 9 L. R. A. (N. S.) 889.

Arizona. See, generally, Prescott Nat. Bank v. Head (Ariz., May 25, 1907), 90 Pac. Rep. 328, 330.

Colorado. Sureties on bond for release of attachment of moneys due contractor: consideration: See Schradsky v. Dunklee, 9 Colo. App. 394, 48 Pac. Rep. 666.

Oregon. No issue raised by answer in action on contractor's bond: See Enterprise H. Co. v. Book (Oreg., May 1, 1906), 85 Pac. Rep. 333, 334.

treated only in so far as it relates to the bonds of contractors for the faithful performance of their contracts, and to stipulations against the filing of claims or liens against the employer or his property.

§ 606. **Statutory requirement of contractor's bond.** It has already been seen that the provisions of section twelve hundred and three,[2] requiring the statutory original contract to be accompanied by a bond of the original contractor, to inure to the benefit of any and all persons performing labor for or furnishing materials to the contractor, and making the

Stipulating as to action for breach of contract. The parties to a contract may stipulate that an action for its breach shall be brought within a reasonable specified period, but, where the amount of the liability for liens could not be determined until they were foreclosed, which was after the period of time for commencing suit on the bond, such limitation was, under the circumstances, unreasonable and inoperative; and where such liens are filed by reason of the failure of the surety in carrying out the principal's contract to pay claimants, such limitation is waived: Ausplund v. Ætna I. Co., 47 Oreg. 10, 81 Pac. Rep. 577 (pleading special limitation).

Washington. The sureties have a right to complete the building after abandonment by the contractor: Brodek v. Farnum, 11 Wash. 565, 572, 40 Pac. Rep. 189.

As to counterclaim of surety, and liability of sureties for damages for delay, and defective material and workmanship, see Brodek v. Farnum, supra.

Corporation as surety: See Wheeler v. Everett L. Co., 14 Wash. 630, 45 Pac. Rep. 316.

Owner may waive breach of contract, caused by the mere filing of subclaimants' liens, on the theory that the contractor's bond is not broken thereby until a lien is charged against his property by judgment, so that an action brought on the bond within the time limited therein from the date of such judgment is in time: Denny v. Spurr, 38 Wash. 347, 80 Pac. Rep. 541; Washington S. I. Co. v. Flynn, 38 Wash. 701, 80 Pac. Rep. 544. See Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794 (compensated surety); Ovington v. Ætna I. Co., 36 Wash. 473, 78 Pac. Rep. 1021; Beebe v. Redward, 35 Wash. 615, 77 Pac. Rep. 1052 (surety not prejudiced).

Distinction between voluntary guarantor and compensated surety: See Cowles v. United States F. & G. Co., 32 Wash. 120, 72 Pac. Rep. 1032, 98 Am. St. Rep. 838.

Contractor having partner unknown to owner and surety does not release surety: Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784.

[2] **Kerr's Cyc. Code Civ. Proc.,** § 1203. This section, in 1885, required no bond to be given, but if a bond was given, it was required to be filed, otherwise it was void, etc. This section continued in force until 1887, when it was repealed, and no provision was made with reference to bonds until the enactment of the section in the form suggested in the text. Bond on contract for street-work, under Street Improvement Act of March 18, 1885, § 6½ (new), Stats. 1899, p. 23, **Henning's General Laws,** p. 1316.

owner and contractor liable in damages to lien-holders for a failure so to do, has been declared unconstitutional.[3] Under the circumstances, no extended discussion of the statutory bond will be made.

§ 607. **Same. Application of provision.** The bond required by the provisions of section twelve hundred and three,[4] which, as heretofore stated, was declared unconstitutional, was a statutory bond, and was applicable only to statutory original contracts, and not to non-statutory original contracts; and the general principles applicable to statutory bonds are pertinent in this connection.[5]

§ 608. **Statutory bond. Formalities.** Where, however, the statutory bond is never filed, although signed by the sureties and left in the possession of a third party, no recovery can be had on the bond against the sureties; the individuals composing the class of the obligees not being known at the time of the execution of the contract, and it being impossible to deliver the bond to them personally, or to any agent for them, and a filing for record being such delivery, as in the case of an official bond.[6]

§ 609. **Same. Statutory bond void.** The statutory bond of a contractor, given under the provisions of section twelve hundred and three of the Code of Civil Procedure, being held unconstitutional, it is immaterial whether the failure of the subclaimant to file a claim of lien does or does not relieve the sureties, as they were not obligated under it.[7]

[3] See § 39, and §§ 281 et seq., ante.

[4] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[5] **Penalty of "failure to comply with the provisions** of this section" did not render void any bond that may be filed, but gave rise to an action for damages: See "Cumulative Remedies," §§ 638 et seq., post. Bond valid as a common-law bond: See Central L. & M. Co. v. Center, 107 Cal. 193, 196, 40 Pac. Rep. 334; and § 612, post, and §§ 281 et seq., ante.

[6] Mangrum v. Truesdale, 128 Cal. 145, 146, 60 Pac. Rep. 775.

Approved: Carpenter v. Furrey, 68 Cal. 665, 669, 61 Pac. Rep. 369.

Distinguished: Gibbs v. Tally, 133 Cal. 373, 378, 65 Pac. Rep. 970, 63 Id. 168, 60 L. R. A. 815.

[7] San Francisco L. Co. v. Bibb, 139 Cal. 325, 73 Pac. Rep. 864.

§ 610. **Same. Contract void. Bond valid.** The owner's failure to record a statutory original contract does not increase the obligation of the sureties for the principal obligors named in the bond, whereby the sureties might be discharged, but a stipulation may be inserted in the bond that the original contract should be filed, as a condition precedent to their liability as sureties;[8] in which case the rule would be otherwise. Hence where the statutory original contract is void, a bond given by a contractor to the owner, guaranteeing performance of all the conditions of the contract, and that the building should be delivered free from all liens that might arise from or be filed against the building on account of material or labor furnished by the contractor, and used in or about the structure, is valid, and binding upon the sureties.[9] And this is the rule where the bond is given after the execution of an unrecorded or void statutory original contract, and refers to the contract as the inducement or consideration for its execution;[10] for a bond to secure the owner against the payment of liens is so far an independent undertaking that the right to enforce it does not depend upon the subsequent or continued validity of the building contract; and the act of the contractors in giving the bond as such independent security, and thereby inducing the owner of the building to make full payment of the contract price to them, estops them from disputing the truth of the recital of the bond as to the contract, and from denying their liability upon it for liens which they failed to discharge, and which the owner was compelled to pay.[11]

[8] Kiessig v. Allspaugh, 99 Cal. 452, 455, 34 Pac. Rep. 106, **overruling** Schallert-Ganahl L. Co. v. Neal, 90 Cal. 213, 27 Pac. Rep. 192, and Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. Rep. 662, 13 L. R. A. 418.

[9] Blyth v. Robinson, 104 Cal. 239, 241, 37 Pac. Rep. 904 (before amendment of § 1203 in 1893); Summerton v. Hansen, 117 Cal. 252, 253, 49 Pac. Rep. 135; Kiessig v. Allspaugh, 91 Cal. 234, 237, 27 Pac. Rep. 662, 13 L. R. A. 418, s. c. 99 Cal. 452, 453, 34 Pac. Rep. 106; McMenomy v. White, 115 Cal. 339, 344, 47 Pac. Rep. 109, **overruling** Schallert-Ganahl L. Co. v. Neal, 90 Cal. 213, 215, sub nom. Stovell v. Neal, 27 Pac. Rep. 192.

[10] Kiessig v. Allspaugh, 91 Cal. 234, 238, 27 Pac. Rep. 662, 13 L. R. A. 418 (under Code Civ. Proc., § 1203, as it stood at the time of the contract, the bond was required to be filed with the contract; otherwise it was void; but in this case the bond was given after the contract was made). See Union S. M. Works v. Dodge, 129 Cal. 390, 394, 62 Pac. Rep. 41.

[11] Kiessig v. Allspaugh, 91 Cal. 234, 237, 27 Pac. Rep. 662, 13 L. R. A. 418; Union S. M. Works v. Dodge, 129 Cal. 390, 394, 62 Pac. Rep. 41.

§ 611. **Same. Liability on statutory bond.** Where the condition of a bond is that the contractors "shall duly pay" the value of materials to persons furnishing the same, and that it should be void if so paid, the obligation is accessory and collateral, and can be enforced against the sureties only to the extent that the same obligation can be enforced against the contractor.[12]

§ 612. **Same. Statutory bond, when enforceable as a common-law obligation.** A bond may be enforceable as a common-law bond, where it makes no reference to section twelve hundred and three of the Code of Civil Procedure, requiring the contractor to file a bond, which was held unconstitutional, and therefore void, the bond deriving its force from its own provisions, and not from any statute, nor from the contract, which was void for failure to comply with the statute.[13]

§ 613. **Common-law bonds. Formalities.** It is not necessary for the contractor to sign the bond.[14] A joint and sev-

[12] Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74 (apparently a statutory bond, the requirement for which has been held unconstitutional: See § 39, ante). See Paige v. Carroll, 61 Cal. 211; Sonoma County v. Hall, 132 Cal. 589, 62 Pac. Rep. 257, 312, 65 Id. 12, 459; also Farmers' & M. Bank v. Kingsley, 2 Doug. (Mich.) 378, 403.

Washington. A surety of a building contractor held not bound by a final settlement made without notice to it by the owner, contractor, and architect: Exposition Amusement Co. v. Empire State Surety Co. (Wash.), 96 Pac. Rep. 158.

In an action by the owner against the surety of the building contractor on its agreement to hold the owner free from claims for materials, the owner held entitled to show the amount of such claims, though claimant, made a party, did not appear: Exposition Amusement Co. v. Empire State Surety Co. (Wash.), 96 Pac. Rep. 158.

[13] People's L. Co. v. Gillard, 136 Cal. 55, 62, 68 Pac. Rep. 576.

See §§ 39, 281 et seq., ante, and authorities cited.

See also Union S. M. Works v. Dodge, 129 Cal. 390, 62 Pac. Rep. 41; Summerton v. Hanson, 117 Cal. 252, 49 Pac. Rep. 135; Kiessig v. Allspaugh, 99 Cal. 452, 34 Pac. Rep. 106.

Washington. Bond running to city, as obligee, instead of state, as required by statute, good as a common-law bond: See Pacific B. Co. v. United States F. & G. Co., 33 Wash. 47, 73 Pac. Rep. 772.

[14] Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072; Kurtz v. Forquer, 94 Cal. 91, 94, 29 Pac. Rep. 413, **distinguishing** Sacramento v. Dunlap, 14 Cal. 421, and People v. Hartley, 21 Cal. 585, 82 Am. Dec. 758. See Weir v. Mead, 101 Cal. 125, 129, 35 Pac. Rep. 567, 40 Am. St. Rep. 46.

Montana. Cockrill v. Davie, 14 Mont. 131, 35 Pac. Rep. 958 (he having bound himself by the original contract).

eral bond is not void merely owing to the fact that all obligors mentioned in the bond do not sign the same,[15] and the sureties, signing the bond and delivering the same to the obligee without the signature of the principal, are liable thereunder.[16] But it is otherwise if the bond is joint,[17] or if several persons are named in the body of the instrument as parties thereto, and it appears on the face of the instrument, or by proof, that the person sought to be charged signed upon the consideration that the other persons named would also sign.[18]

§ 614. General rule of surety's liability. A surety has the right to stand upon the terms of his contract, and any alteration in the contract price, whereby his obligations are increased, made by the parties thereto, without his consent,

[15] Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

Oregon. Sureties signing contract as principals: Thompson v. Coffman, 15 Oreg. 631, 16 Pac. Rep. 713.

[16] Kurtz v. Forquer, 94 Cal. 91, 93, 29 Pac. Rep. 413. See Weir v. Mead, 101 Cal. 125, 35 Pac. Rep. 567, 40 Am. St. Rep. 46.

Arizona. Obligee of bond sued without joining principal: See Prescott N. Bank v. Head (Ariz., May 25, 1907), 90 Pac. Rep. 328.

Montana. Cockrill v. Davie, 14 Mont. 131, 35 Pac. Rep. 958.

Washington. As to consideration of bond, although contractor was in possession and had commenced work before its execution, see De Mattos v. Jordan, 15 Wash. 378, 46 Pac. Rep. 402.

[17] Kurtz v. Forquer, 94 Cal. 91, 29 Pac. Rep. 413. See Weir v. Mead, 101 Cal. 125, 35 Pac. Rep. 567, 40 Am. St. Rep. 46 (probate bond).

[18] Cavanaugh v. Casselman, 88 Cal. 543, 26 Pac. Rep. 515; Kurtz v. Forquer, 94 Cal. 91, 94, 29 Pac. Rep. 413.

Colorado. Purchaser of property, executing bond after delivery of material, where no lien was created on property: See Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83.

Montana. See Cockrill v. Davie, 14 Mont. 131, 35 Pac. Rep. 958.

Oregon. Surety bound, on the principle of estoppel, where he signed a bond and delivered it to the principal on the understanding that another surety should be procured, the bond being regular on its face, and delivered to the obligee in the absence of any showing of notice to the obligee as to the condition: Wollenberg v. Sykes (Oreg., March 19, 1907), 89 Pac. Rep. 148.

Washington. Where the surety delivers a bond to the contractor for the purpose of closing a building contract with the owner, the contractor is thereby constituted the surety's agent, and the surety is bound, in the absence of anything on the face of the bond tending to put the owner on inquiry: Gritman v. United States F. & G. Co. (Wash., Dec. 20, 1905), 83 Pac. Rep. 6.

As to consideration of bond, although contractor was in possession and had commenced work before its execution, see De Mattos v. Jordan, 15 Wash. 378, 46 Pac. Rep. 402.

Date of bond antecedent to date of contract: See Spokane & I. L. Co. v. Loy, 21 Wash. 501, 58 Pac. Rep. 672.

will discharge him from liability.[19] An alteration of the plans, under a statutory original contract calling for a building to cost sixteen thousand three hundred dollars, whereby the cost was increased three hundred and fifteen dollars, released the sureties on the contractor's bond given to secure the performance of such contract by the contractor, as, under the general rule laid down in section two thousand eight hundred and nineteen of the Civil Code,[20] such alteration is material.[21]

The expression found in the opinions in some cases, that a surety is discharged by any "material" alteration of the contract, has no reference to such an alteration as will merely vary the form of the contract without changing its substance, but it does include such an alteration as will increase the obligation for which the indemnity was given. An increase of upward of three hundred dollars is a material alteration.[22]

[19] Alcatraz M. H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 85 Pac. Rep. 156, 157; Tally v. Ganahl (Cal. App., June 19, 1907), 90 Pac. Rep. 1049; Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. Rep. 765; Boas v. Maloney, 138 Cal. 105, 70 Pac. Rep. 1004. See:

Arkansas. O'Neal v. Kelley, 65 Ark. 550, 47 S. W. Rep. 409.

Georgia. Bethune v. Dozier, 10 Ga. 235.

Indiana. Judah v. Zimmerman, 22 Ind. 388.

Missouri. Beers v. Wolf, 116 Mo. 179, 22 S. W. Rep. 620; Eldridge v. Fuhr, 59 Mo. App. 44.

Oregon. Corporation surety has same right as private surety to stand upon its strict rights: Ausplund v. Ætna I. Co., 47 Oreg. 10, 81 Pac. Rep. 577.

Federal. Miller v. Stewart, 22 U. S. (9 Wheat.) 680, bk. 6 L. ed. 190.

Sureties are entitled to stand upon the strict terms of their contract: Boas v. Maloney, 138 Cal. 105, 107, 70 Pac. Rep. 1004; Cadenasso v. Antonelle, 127 Cal. 382, 59 Pac. Rep. 765; Tally v. Parsons, 131 Cal. 516, 518, 63 Pac. Rep. 833.

[20] **Kerr's Cyc. Civ. Code,** § 2819, and see note thereto.

[21] Alcatraz M. H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 85 Pac. Rep. 156 (contract price, $16,300; increased costs, $315).

See § 615, post.

Colorado. Any change in the contract for the performance of which a surety is bound, without his consent, relieves him from liability, and the burden rests upon the one seeking to charge the surety to prove the latter's assent to such change: United States v. McIntyre (Colo.), 111 Fed. Rep. 590 (Cir. Ct.).

[22] Alcatraz M. H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 85 Pac. Rep. 156, 158. There is evidently a mistake in the statement of the court in this case. Undoubtedly, the rule, as stated in the text, was intended to be expressed.

Material alteration vitiating contract. Increased cost, $25, in O'Neal v. Kelley, 65 Ark. 550, 47 S. W. Rep. 409; increase of $231 over contract price of $31,000, in Beers v. Wolf, 116 Mo. 179, 22 S. W. Rep. 620.

§ 615. Original contract as basis of liability. The sureties have a right to show that the original contract sued on was not the contract under which the work was done, in those cases where there has been a modification of the original contract, and the building completed in accordance with the contract as thus modified.[23]

Changes in contract authorized by contract. Where a contract was made by a school board for the construction of a public school building, and the contractor gave a bond for the performance of the contract, under which the board could alter the contract, and the alterations should in no way affect or avoid the same, etc., changes as to the plan of the building, within the scope of the provision of the contract, do not relieve the sureties from liability.[24]

Oregon. Changes in contract, materially changing, varying, or increasing the risk, release sureties, but otherwise if with their consent: Enterprise H. Co. v. Book (Oreg., May 1, 1906), 85 Pac. Rep. 333, 334.

Provision in contract for benefit of contractor, that alterations should be made in writing, may be waived by him; and where the bond provides that any departure from the specifications or alterations in the same should not avoid the bond, the sureties are liable: Enterprise H. Co. v. Book (Oreg., May 1, 1906), 85 Pac. Rep. 333, 334.

Washington. A surety cannot insist upon anything constituting a breach which the owner does not insist upon, unless he shows that the breach operated in some manner to his prejudice: Beebe v. Redward, 35 Wash. 615, 77 Pac. Rep. 1052, 1055.

Guaranty company which, for a compensation, becomes surety upon a bond, given by a building contractor for the faithful performance of his contract, cannot escape liability by reason of variance from the exact terms of the contract, where such provisions were waived by the contractor, and no damage is shown as resulting to the surety by reason thereof: Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794, 797 (failure of owner to pay contractor in full).

Surety's liability on change of plans at additional cost: See Ovington v. Ætna I. Co., 36 Wash. 473, 78 Pac. Rep. 1021; and, generally, unless such notice is given within the time specified, the damages are waived: Trinity Parish v. Ætna I. Co., 37 Wash. 515, 79 Pac. Rep. 1097. See Remington v. Fidelity & D. Co., 27 Wash. 429, 67 Pac. Rep. 989.

Application of payments for benefit of surety: See Crane Co. v. Pacific H. & P. Co., 36 Wash. 95, 78 Pac. Rep. 460, 86 Id. 849.

Alterations in work, order of architect: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25, 29.

Contract providing that owner should pay receipted bills as they became due does not release the surety, where the owner required such bills to be approved by the foreman in charge: Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784.

[23] People's L. Co. v. Gillard, 136 Cal. 55, 62, 68 Pac. Rep. 576.

[24] People's L. Co. v. Gillard, 136 Cal. 55, 62, 68 Pac. Rep. 576. See § 614, ante.

Action on bond; change of contract: See People's L. Co. v. Gillard, 136 Cal. 55, 61, 68 Pac. Rep. 576.

§ 616. **Auditing accounts, as provided in contract.** Where the owner finishes an abandoned contract at a cost greater than the price provided in the contract, a clause therein, that, under such circumstances, "the expense incurred by the owner shall be audited and certified by the architects, whose certificate thereof shall be conclusive between the parties," makes the certificate a condition precedent, and the sureties on the contractor's bond for the faithful performance of the contract are not liable without such certificate; and even where the owner discharged the architects on the ground that they were careless, incompetent, and dishonest, unless found to be so by the court, or there was a sufficient excuse for not having the amount audited and certified by the architects, such as a refusal on their part to do so, or that they acted fraudulently or corruptly, or through mistake, no recovery can be had against the sureties.[25]

§ 617. **Construction of bond.** The general subject of the construction of bonds will not be considered, but the cases decided in the jurisdictions herein considered, relating to the title of this work, will only be set forth.

Evidence and pleading. Contract for liquidated damages against sureties: See Long Beach School Dist. v. Dodge, 135 Cal. 401, 405, 67 Pac. Rep. 499.

Oregon. Surety bound by the express terms of contract: Enterprise H. Co. v. Book (Oreg., May 1, 1906), 85 Pac. Rep. 333, 334.

Bond conditioned for the faithful performance by the contractor of "all the terms, covenants, and conditions" of his contract, incorporates contract in bond: Ausplund v. Ætna I. Co., 47 Oreg. 10, 81 Pac. Rep. 577. See McKinnon v. Higgins, 47 Oreg. 44, 81 Pac. Rep. 581.

Washington. Where a compensated surety is not damaged by an extension of time for contractor to complete the work, surety is liable for contractor's failure to pay claims for labor and materials: Henry v. Ætna I. Co., 36 Wash. 553, sub nom. Henry v. Flynn, 79 Pac. Rep. 42. See Cowles v. United States F. & G. Co., 33 Wash. 120, 72 Pac. Rep. 1032, 98 Am. St. Rep. 838.

Surety is liable, even though variances from the contract are made by the original contractor and subcontractor, if they were allowed by the original contract. Such bonds are contracts for compensation, and not insurance contracts: Pacific B. Co. v. United States F. & G. Co., 33 Wash. 47, 73 Pac. Rep. 772.

Where contract and bond contemplate employment of subcontractors, performance of part of work by owner not discharging sureties: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

[25] Tally v. Parsons, 131 Cal. 516, 520, 63 Pac. Rep. 833.

See §§ 238 et seq., ante.

"Claims accruing." A provision in a bond, whereby the sureties bound themselves to pay all "claims that may have accrued against the said building by reason of the aforesaid erection," does not make the sureties liable for releasing liens which could not be legally enforced against the building, as such claims cannot be said to have "accrued" against it.[26]

Performing obligation of void contract. Where there is no covenant in a building contract that the building shall be delivered free from liens, nor that liens shall not be placed upon it, and the contractor completed the work within the time and according to the plans and specifications of the contract, and he was paid the full amount of the contract price, and no complaint is made as to the contract not being complied with, the sureties are not responsible for subclaimants' liens on the building, although the contract was void and the liens were valid, such liability not falling within the condition of the bond that the contractor should perform the obligations of his contract.[27]

Money advanced not "materials," within obligation. Where the undertaking of the sureties is to pay all persons performing labor or furnishing materials to the contractor, the sureties are not liable to third parties who advanced money to the contractor, such money not being materials, within the meaning of the contract of suretyship.[28]

[26] Brill v. De Turk, 130 Cal. 241, 244, 62 Pac. Rep. 462.

[27] Boas v. Maloney, 138 Cal. 105, 107, 70 Pac. Rep. 1004. See Gato v. Warrington, 37 Fla. 542, 19 So. Rep. 883; Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784.

[28] Cadenasso v. Antonelle, 127 Cal. 382, 386, 59 Pac. Rep. 765, **approved** in Boas v. Maloney, 138 Cal. 105, 108, 70 Pac. Rep. 1004. See Boas v. Maloney, 138 Cal. 105, 107, 70 Pac. Rep. 1004; Godeffroy v. Caldwell, 2 Cal. 489, 492.

Hawaii. See Hackfeld v. Hilo R. Co., 14 Hawn. 448, 454.

Illinois. City of Sterling v. Wolf, 163 Ill. 467, 45 N. E. Rep. 218.

Minnesota. Simonson v. Grant, 36 Minn. 439, 31 N. W. Rep. 861.

See §§ 87 et seq., ante.

Oregon. Bond construed as indemnity against damages, rather than against liability — nominal damages: See Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.

Washington. Bond to be construed with reference to the gathered intention of the parties to the contract, and whatever is binding upon them is binding upon the surety, who becomes a party to the contract, identified with the contractor: Cowles v. United States F. & G. Co., 32 Wash. 120, 72 Pac. Rep. 1032, 98 Am. St. Rep. 838.

§ 618. Surety's rights. Notice. It has been intimated that the surety is entitled to notice of the action to foreclose the liens and have the same properly defended.[29] But, however this may be, in the absence of a provision therefor in the bond, no notice or demand was required, with respect to the contractor's bond, under section twelve hundred and three of the Code of Civil Procedure, which was subsequently declared unconstitutional, although the provision was held constitutional in the case cited.[30]

Where the bond provided that the contractor would "faithfully comply with all the terms" of the contract, one of the terms being that he should furnish all the materials, the sureties are liable to the owner for materials unpaid for, and the owner need not previously have paid the claims therefor: Trinity Parish v. Ætna I. Co., 37 Wash. 515, 79 Pac. Rep. 1079, **explaining and distinguishing** Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794.

Provision in contract for the faithful performance of which a bond is given, requiring contractor to furnish materials, means that he should pay for them, and not that he should simply supply them and leave the owner to pay for them: Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784; Wheeler, Osgood & Co. v. Everett L. Co., 14 Wash. 630, 45 Pac. Rep. 316.

[29] Ernst v. Cummings, 55 Cal. 179, 183. But see **Kerr's Cyc. Civ. Code,** §§ 2831 et seq., and notes.

[30] Carpenter v. Furrey, 128 Cal. 665, 668, 61 Pac. Rep. 369.

See § 39, ante.

Arizona. The provision of Rev. Stats. 1901, par. 3551, apply to a contractor's bond, and the surety may require, by notice in writing, the creditor or obligee forthwith to institute suit, and a notice precisely following the language of the statute complies therewith, without reciting that the right of action has accrued, or that the surety's intention was to avail himself of the discharge provided for by par. 3552: Prescott N. Bank v. Head (Ariz., May 25, 1907), 90 Pac. Rep. 328.

Colorado. Notice to surety company, by one of its agents, at the request of obligee, sufficient, where a bond required notice to company at its principal office, by mail: See Routt v. Diis (Colo., May 6, 1907), 90 Pac. Rep. 67.

Notice to surety of contractor's failure to perform contract "forthwith," or "as soon as possible," or "immediately," satisfied by due diligence, under the circumstances of the case, and is ordinarily a question of fact, unless the facts are undisputed: Routt v. Diis (Colo., May 6, 1907), 90 Pac. Rep. 67.

Sureties completing contract on death of contractor, reaffirming obligation, and agreeing to pay bills arising out of original contract, although lien fails, personal judgment obtained against owner: See Hughes v. Gibson, 15 Colo. App. 318, 62 Pac. Rep. 1037.

Idaho. Surety has the right to complete contract, when so provided in bond: American B. Co. v. Regents, 81 Pac. Rep. 604, 610 (compensated surety).

Where the surety is notified that the contractor had defaulted, and assumes to carry out the terms of the contract, as permitted by the bond, the surety becomes liable to the obligee for all inferior work done by the contractor, and agrees to make good any defects in his

§ 619. **Surety as lien claimant.** But, under a void contract,[31] as well as under a valid contract,[32] it has been held that a claimant is not barred from coming into court with his cause of action to foreclose a lien, even though he is a

work or materials, both before and after it assumed the contract: American B. Co. v. Regents (Idaho, July 11, 1905), 81 Pac. Rep. 604, 610 (compensated surety).

Oregon. Surety, carrying out contract of contractor, is subrogated to the latter's rights and obligations under the contract: Ausplund v. Ætna I. Co., 47 Oreg. 10, 81 Pac. Rep. 577.

Contractor failing to keep building free from liens, as agreed, last payment cannot be demanded by sureties: See Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330; and see Hand M. Co. v. Marks, 36 Oreg. 523, 59 Pac. Rep. 549, 552 (deed of land and part payment).

Washington. Where the bond provided for immediate notice of the breach of the contract, and fixed a period within which suit must be brought thereafter, action must be commenced by the owner within the prescribed period after knowledge of the breach, and he should notify the sureties: Novelty M. Co. v. Heinzerling, 39 Wash. 244, 81 Pac. Rep. 742. See Henry v. Flynn, 36 Wash. 553, 79 Pac. Rep. 42.

Where bond provides that surety should be notified of any act of contractor which might create a liability on the part of the surety, immediately after owner's knowledge of act, notice of subclaimants' demands, given on the day succeeding that on which the various claims of lien were filed against the building, is in time, although the owner had previous notice of the furnishing of such materials to the contractor: Washington S. I. Co. v. Flynn, 38 Wash. 701, 80 Pac. Rep. 544; Denny v. Spurr, 38 Wash. 347, 80 Pac. Rep. 541. See Ovington v. Ætna I. Co., 36 Wash. 473, 78 Pac. Rep. 1021; Heffernan v. United States F. & G. Co., 37 Wash. 477, 79 Pac. Rep. 1095.

Surety is estopped, in action on bond, by a judgment of owner against contractor for breach of contract, obtained in good faith, without fraud or collusion, where surety had due notice of suit against contractor, and was offered the defense thereof: Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794; Henry v. Flynn, 36 Wash. 553, 79 Pac. Rep. 42. See Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186; Doremus v. Root, 23 Wash. 710, 716; 63 Pac. Rep. 572, 54 L. R. A. 649; Trinity Parish v. Ætna I. Co., 37 Wash. 515, 79 Pac. Rep. 1097.

Refusal of owner to arbitrate. Evidence. The fact that an owner had refused to arbitrate the reasonable value of extras, as provided in the contract, was admissible, in an action on the bond, since the surety was entitled to have the same offset pro tanto against the owner's claim: Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784.

Notice or knowledge of default of contractor by owner: See Henry v. Flynn, 36 Wash. 553, 79 Pac. Rep. 42.

[31] Schallert-Ganahl L. Co. v. Neal, 90 Cal. 213, 215, 27 Pac. Rep. 192; Blyth v. Torre (Cal., Dec. 14, 1894), 38 Pac. Rep. 639.

[32] Patent B. Co. v. Moore, 75 Cal. 205, 207, 16 Pac. Rep. 890; Blyth v. Torre (Cal., Dec. 14, 1894), 38 Pac. Rep. 639. See Bragg v. Shain, 49 Cal. 131, 136.

Pleading estoppel: See Hubbard v. Lee (Cal. App., Oct. 11, 1907), 92 Pac. Rep. 744.

Arizona. Bond requiring the contractor to pay lien claims: See Prescott Nat. Bank v. Head (Ariz., May 25, 1907), 90 Pac. Rep. 328, 330.

Montana. Eakins v. Frank, 21 Mont. 192, 53 Pac. Rep. 538, **contra.**

surety for the contractor, to protect the owner against the default or negligence of the contractor; for, until the damages have been alleged and proven in some proper action, it is rather a question of cross-complaint or set-off than of estoppel.[33] This doctrine of estoppel, however, in the light of a subsequent decision, stated in the following section, loses much force and meaning, even if the authorities here cited have not been impliedly overruled.

§ 620. Surety under legal obligation not to foreclose lien. Notwithstanding the fact, as stated in the last preceding section, that it had been held that a surety on a contractor's bond, conditioned against the filing of liens, was not estopped to foreclose such lien, it was subsequently determined that —

Where the contractor's sureties furnish materials to him, and duly file a claim of lien against the building therefor, and the owner gives them a note to cancel the lien, there being no evidence that the note was given to compromise a doubtful claim, it is without any legal consideration to support it, and as to the forbearance of the sureties to foreclose the lien, they were already under a legal obligation not to foreclose the same, the bond providing that the structure

[33] Blyth v. Torre (Cal., Dec. 14, 1894), 38 Pac. Rep. 639. In this case the bond seems to indemnify against damage, but in the syllabus, against liens. The case was dismissed, after rehearing granted. The question of mere waiver was not discussed in the opinion. See Mangrum v. Truesdale, 128 Cal. 145, 146, 60 Pac. Rep. 775.

Arizona. Prescott N. Bank v. Head (Ariz., May 25, 1907), 90 Pac. Rep. 328, 330.

Colorado. Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846 (subcontractors).

Hawaii. Under a bond to deliver the building free from liens and claims, surety is not estopped to assert lien: Allen v. Lincoln, 9 Hawn. 364.

Montana. See Eakins v. Frank, 21 Mont. 192, 53 Pac. Rep. 538.

Oregon. Surety estopped to file claim of lien, but if owner discharges surety from obligation of bond, lien may be enforced: Hand M. Co. v. Marks, 36 Oreg. 523, 59 Pac. Rep. 549, 551.

Washington. But, in this state, it is held that such surety cannot file and enforce a lien against the building, although the owner may in fact be indebted at the time to the contractor: Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789; Moise v. Mansfield, 10 Wash. 373, 38 Pac. Rep. 1050; Todd v. Franzvog (Wash., Nov. 27, 1906), 87 Pac. Rep. 831; Kent L. Co. v. Ward, 37 Wash. 60, 79 Pac. Rep. 485.

should be delivered free from all liens; and in canceling this lien they conferred no benefit upon the defendant to which he was not already legally entitled, and themselves suffered no detriment they were not already legally bound to suffer, and this is not a sufficient consideration for the note; and even if it has sufficient consideration to support it, the sureties cannot recover, at least not beyond the amount of damage counterclaimed by the owner; for it was given for the purpose of discharging one of the liens against which plaintiffs, as sureties, undertook to indemnify the defendant, and immediately upon the payment of such note, a cause of action would arise by virtue of the bond in favor of the owner against the sureties for the amount so paid; and, under such circumstances, and to avoid circuity of action, the defendant should be permitted to interpose the plaintiff's liability upon the bond as a defense.

The sureties are not released from their obligation as sureties for the contractor, and no such legal effect was worked out by the mere fact that the owner executed the note sued on, under the circumstances stated; and even if the note were given under the mistaken belief that the bond was void because the statutory original contract was void, it did not destroy the obligation of the bond.[34]

§ 621. Obligee of bond destroying security of surety. When the principal has left a sufficient fund in the hands of

[34] Blyth v. Robinson, 104 Cal. 239, 242, 37 Pac. Rep. 904. In this case there was no evidence that the note was given to compromise a doubtful claim. See Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

See "Answer," §§ 746 et seq., post; "Estoppel," §§ 816 et seq., post.

Utah. Surety on bonds conditioned against liens or claims not entitled to lien: Smith v. Bowman (Utah, Jan. 15, 1907), 88 Pac. Rep. 687, 9 L. R. A. (N. S.) 889.

Washington. But see Dibbie v. De Mattos, 8 Wash. 542, 36 Pac. Rep. 485, in which it was held that where surety paid the laborers of the absconding contractor, upon the promise of the owner to repay the same to the surety, so that work could progress at once, there was a sufficient consideration for the promise (Stiles and Hoyt, JJ., dissenting), and that it was not within the statute of frauds as a promise to answer for the debt of another, but an original undertaking: Dibbie v. De Mattos, 8 Wash. 542, 36 Pac. Rep. 485.

The contract may be rescinded by the owner and surety, so far as the surety is concerned, in the absence of the principal: Gottstein v. Seattle L. & C. Co., 7 Wash. 424, 35 Pac. Rep. 133.

the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety cannot be called upon.[35]

Where a contractor assigns to one of his sureties checks given him for government work, as security, at least, for such surety's advances to him, under section two thousand eight hundred and forty-nine of the Civil Code, the other surety is entitled to the benefit of the securities thus held by the first surety.[36]

§ 622. **Premature payments. Generally.** Premature payments made by owner, not authorized by the contract, exonerate the sureties.[37] Results following the failure of the

[35] Kiessig v. Allspaugh, 91 Cal. 231, 232, 27 Pac. Rep. 662, 13 L. R. A. 418.

See note 13 L. R. A. 418.

[36] National Bank v. Schirm, 3 Cal. App. 696, 86 Pac. Rep. 981.

See **Kerr's Cyc. Civ. Code,** § 2849, and note.

Oregon. Second bond, taken as additional security, does not discharge surety: Hand M. Co. v. Marks, 36 Oreg. 523, 59 Pac. Rep. 549, 552.

[37] Glenn County v. Jones, 146 Cal. 518, 80 Pac. Rep. 695, **distinguishing** Hand M. Co. v. Marks, 36 Oreg. 523, 52 Pac. Rep. 512, **criticizing** Fidelity & D. Co. v. Robertson, 136 Ala. 379, 34 So. Rep. 933, and Meyers v. Wood, 26 Tex. Civ. App. 591, 65 S. W. Rep. 671.

Arizona. See Prescott N. Bank v. Head (Ariz., May 25, 1907), 90 Pac. Rep. 328.

Montana. A surety upon a contract providing that the men shall be paid by the owner upon time-checks signed by the contractor, who, with knowledge of such provision, and that the contract price is exhausted, instructs the owner to pay the men, thereby waives the right to object that the time-checks were not signed by the contractor: Hamilton v. Woodworth, 17 Mont. 327, 42 Pac. Rep. 849.

Nevada. Where the bond provides that "it is to secure the plaintiff, and keep it harmless from all liens and claims of liens," it is purely a contract of indemnity, and is not violated by simply permitting liens to be filed: Carson Opera House Assoc. v. Miller, 16 Nev. 327. See Jones v. Childs, 8 Nev. 121, 125.

Sureties are exonerated when the owner retains a portion of the contract price to pay such claims before suit brought thereon, the statute allowing such retention only "during the pendency of such action": Carson Opera House Assoc. v. Miller, supra. See Truckee Lodge v. Wood, 14 Nev. 293, 309, for various acts of owner exonerating sureties, such as failure to make weekly payments and to retain certain moneys as agreed, and changing terms of contract.

Oklahoma. Changes in work, permitted by contract and bond, held not to relieve sureties: American S. Co. v. Scott (Okl., Feb. 14, 1907), 90 Pac. Rep. 7.

Advances to contractor, prematurely made, where no loss accrued to surety or contractors, do not release surety: American S. Co. v. Scott (Okl., Feb. 14, 1907), 90 Pac. Rep. 7.

owner to comply with section eleven hundred and eighty-four [38] are not material upon matters pertaining to the bond.

Advances must be properly made: See 4 Am. & Eng. Ann. Cas. 615.

Oregon. Premature payment absolutely discharges surety: Wehrung v. Denham, 42 Oreg. 386, 71 Pac. Rep. 133, 135, **overruling** Cochran v. Baker, 34 Oreg. 555, 56 Pac. Rep. 641, 52 Id. 520.

Unless payment was made with the knowledge and consent of the surety: Enterprise H. Co. v. Book (Oreg., May 1, 1906), 85 Pac. Rep. 333, 334. See Hand M. Co. v. Marks, 36 Oreg. 523, 52 Pac. Rep. 512, 53 Id. 1072, 59 Id. 549; Wehrung v. Denham, 42 Oreg. 386, 71 Pac. Rep. 133, 135 (no compensated surety).

It was formerly held that the sureties are only exonerated pro tanto, if a payment is prematurely made: Cochran v. Baker, 34 Oreg. 555, 56 Pac. Rep. 641. See also Thompson v. Coffman, 15 Oreg. 631, 635, 16 Pac. Rep. 713.

Bond providing payments made prematurely should not affect the obligation of sureties, held not to release sureties: Enterprise H. Co. v. Book (Oreg., May 1, 1906), 85 Pac. Rep. 333, 334 (extra work).

Waiver of defense of premature payment by provision in bond: See Enterprise H. Co. v. Book (Oreg., May 1, 1906), 85 Pac. Rep. 333, 334.

Where owner pays amounts due on contractor's orders on architect's certificates, as required in the bond, under agreement with contractor, surety not exonerated: Hand M. Co. v. Marks, 36 Oreg. 523, 59 Pac. Rep. 549, 552.

Washington. Peters v. Mackay, 20 Wash. 172, 54 Pac. Rep. 1122.

Sureties are not discharged by deviations from specifications in the construction of the building, nor even by material alterations, where the contract itself permits such alterations: De Mattos v. Jordan, 15 Wash. 378, 46 Pac. Rep. 402; especially where the surety, with the knowledge of the proposed changes, agrees to furnish the necessary mill-work therefor: Wheeler v. Everett L. Co., 14 Wash. 630, 45 Pac. Rep. 316.

Nor are the sureties released where the payments under the contract were to be made monthly, as the work progressed, upon the architect's estimates, and the owner accepts an order from the contractor in favor of the material-man, payable upon the day the estimate becomes due, although a small amount thereof is paid in advance as an accommodation to the material-man: De Mattos v. Jordan, supra. Nor are they released, it seems, even if the owner pays the contractor part of the contract price by returning notes made by the contractor (dictum): Id. Nor because the contractor was compelled to pay his (the contractor's) debts to other parties: Id.

Damages, burden of proving, on owner, and extent of: Id.

Sureties not liable as contractors when. In Stetson & P. M. Co. v. McDonald, 5 Wash. 496, it was held that persons who were to be sureties, but who signed the original contract instead of the bond, were not liable as contractors, the materials being charged to the contractors, and being furnished solely on their credit, it not being known to the claimant, at the time of furnishing the materials, that the sureties were parties to the original contract. But see Thompson v. Coffman, 15 Oreg. 631, 16 Pac. Rep. 713. A provision in the bond that the contractor should furnish the materials must be construed to mean that he will pay for them; otherwise the sureties are liable: Wheeler v. Everett Land Co., 14 Wash. 630, 45 Pac. Rep. 316.

Sureties not injured by irregular payments, whether amount was loan, or advancement under the contract: See Leghorn v. Nydell, 39 Wash. 17, 80 Pac. Rep. 833.

[38] **Kerr's Cyc. Code Civ. Proc., § 1184.**

Premature payments amount to nothing in certain cases of lien claimants, but, under other circumstances, they are payments in every sense of the word, so far as the liability of sureties is concerned.[39]

Thus where a subclaimant was the original contractor's surety, and the bond provides that it is independent of any question as to the validity of the original contract, and that its terms may be changed by the contracting parties without affecting its validity, and was to save and keep the owner harmless from all actions, costs, damages, etc., by reason of any claim growing out of the building to be erected, except the stipulated price, upon a premature payment of such price by the owner to the contractor under section eleven hundred and eighty-four, the subclaimant cannot foreclose a lien for the amount so paid.[40]

§ 623. **Same. Intermediate instalments.** And where the bond provides that the contractor is to deliver the building free from all liens, and provides for payments of seventy-five per cent, to be made in instalments, and the remainder when the work is certified as completed, payment by the owner of amounts more than the instalments, as provided for in the contract, relieves the surety from responsibility.[41]

[39] Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. Rep. 512.

[40] Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. Rep. 512.

[41] Bragg v. Shain, 49 Cal. 131, 135.

Affirmed in Kiessig v. Allspaugh, 91 Cal. 231, 233, 27 Pac. Rep. 655, 13 L. R. A. 418. **Distinguished** in Foster v. Gaston, 123 Ind. 96, 107, 23 N. E. Rep. 1092. **Followed** in Backus v. Archer, 109 Mich. 666, 668, 67 N. W. Rep. 913; Simonson v. Grant, 36 Minn. 439, 443, 31 N. W. Rep. 861; Bell v. Paul, 35 Neb. 240, 245, 52 N. W. Rep. 1110; Gray v. School Dist., 35 Neb. 438, 448, 53 N. W. Rep. 377; Board of Comm'rs v. Branham, 57 Fed. Rep. 179, 182.

See Glenn County v. Jones, 146 Cal. 518, 522, 80 Pac. Rep. 695; Parke & L. Co. v. White River Co., 110 Cal. 658, 665, 43 Pac. Rep. 202; Eppinger v. Kendrick, 114 Cal. 620, 626, 46 Pac. Rep. 613.

Indiana. Foster v. Gaston, 123 Ind. 96, 107, 23 N. E. Rep. 1092.

Iowa. Stillman v. Wickham, 106 Iowa 597, 599, 76 N. W. Rep. 1008.

Michigan. Marquette O. H. Co. v. Wilson, 109 Mich. 223, 230, 67 N. W. Rep. 123.

Minnesota. Pioneer S. & L. Co. v. Freeburg, 59 Minn. 230, 234, 61 N. W. Rep. 25; Graves v. Merrill, 67 Minn. 463, 475, 70 N. W. Rep. 562; Fidelity Mut. L. Assoc. v. Dewey, 83 Minn. 389, 393, 86 N. W. Rep. 423.

Missouri. Taylor v. Jeter, 23 Mo. 244; Evans v. Graden, 125 Mo. 72, 77, 28 S. W. Rep. 439; Burley v. Hitt, 54 Mo. App. 272, 276.

Nebraska. Brennan v. Clark, 29 Neb. 385, 399, 45 N. W. Rep. 472.

Where the owner, under the statutory original contract, is to pay a portion of the price in instalments, and the balance of twenty-five per cent thirty-five days after the completion and acceptance of the work, the surety upon the contractor's bond, in the sum of such balance, conditioned that the contractor should deliver the building within the contract time free from all liens, demands, and claims, is liable only for sums paid by the owner above such amount to satisfy valid liens on the structure, as the surety is entitled to the application of this balance to the payment of such valid liens, and he is liable only for enforceable liens.[42]

Where the contractor is under the obligation of placing all the materials on the building site before he is entitled to any money under the terms of the contract, a payment made to him, without the consent of his sureties, before he did so, materially alters the obligation of such sureties on his bond, conditioned that he should do and perform all things necessary to the erection of a public school building, according to the plans, specifications, and contract, and they are completely exonerated, and not alone to the limit of the amount prematurely paid.[43]

§ 624. **Same. Final instalment.** Where the owner was to retain one quarter of the contract price as additional security against liens upon the building, and for the benefit of the sureties, until final settlement between the parties, in addition to a bond referring to a void statutory original con-

Nevada. Truckee Lodge v. Wood, 14 Nev. 293, 310.

Oregon. Hand Mfg. Co. v. Marks, 36 Oreg. 523, 531, 52 Pac. Rep. 512, 53 Id. 1072, 59 Id. 459.

South Carolina. City Council v. Ormand, 51 S. C. 121, 226, 28 S. E. Rep. 147.

Virginia. Kirschbaum v. Blair, 98 Va. 35, 45, 34 S. E. Rep. 895.

Washington. Peters v. Mackay, 20 Wash. 172, 54 Pac. Rep. 1122.

Wisconsin. Kimball W. W. Co. v. Baker, 62 Wis. 526, 531, 22 N. W. Rep. 730; Stephens v. Elver, 101 Wis. 392, 398, 77 N. W. Rep. 737.

Federal. Mundy v. Stevens, 61 Fed. Rep. 77, 84; United States v. Freel, 92 Fed. Rep. 299, 303.

English. Calvert v. London Dock Co., 2 Keen Ch. 638, 639.

[42] Alcatraz M. H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 85 Pac. Rep. 156.

[43] Glenn County v. Jones, 146 Cal. 518, 520, 80 Pac. Rep. 695, **distinguishing** Hand M. Co. v. Marks, 36 Oreg. 523, 52 Pac. Rep. 512.

See **Kerr's Cyc. Civ. Code,** §§ 2480, 2819.

tract as its inducement,[44] the balance is a special fund to which the sureties may look for their indemnity, and without the consent of the sureties the owner cannot apply it to paying the contractor instead of lien-holders, and after such payment to the contractor, the sureties are relieved of responsibility for any liens paid over and above the contract price.[45]

§ 625. **Liability of sureties. Damages.** Where the original contractors' bond provided that they should complete the building within a specified time, and deliver it to the owner "free from all liens and claims that may be made or filed against the same for or in respect to any labor or materials performed or furnished in or for said building," and the amount of liens was ascertained and paid into court to discharge those claimed against the owner's property, one hundred dollars, paid for attorneys' fees, was allowed as reasonable damages, within the terms of the bond, approximately caused by the breach of the agreement to deliver the building free from liens, the owner acting in good faith; and loss of rent, owing to such default of the contractors, is also damage directly caused by the breach of the bond, and is properly allowed.[46]

[44] Such a statutory bond was, however, later held void, the provision being unconstitutional: See § 39, and §§ 281 et seq., ante.

[45] Kiessig v. Allspaugh, 91 Cal. 231, 232, 27 Pac. Rep. 655, 13 L. R. A. 418.

Wyoming. But where an owner paid the contractor in full, although the latter was liable in damages, it was held, under the facts of the case, that the owner was not estopped to hold the sureties on the contractor's bond for the amount of the damage: Halleck v. Bresnahen, 3 Wyo. 73, 2 Pac. Rep. 537.

[46] Tally v. Ganahl (Cal. Sup., June 19, 1907), 90 Pac. Rep. 1049. See Tally v. Parsons, 131 Cal. 516, 63 Pac. Rep. 833.

Liability of sureties on contractors' bond on failure of owner to secure certificate of architect, strictly as provided in contract: See Tally v. Ganahl (Cal. Sup., June 19, 1907), 90 Pac. Rep. 1049. See Tally v. Parsons, 131 Cal. 516, 63 Pac. Rep. 833.

Oklahoma. Surety not released for damages of a certain amount per day for delay, where contractor continues work beyond the stipulated time, with the mere knowledge of the owner, there being no agreement for extension: American S. Co. v. Scott (Okl., Feb. 14, 1907), 90 Pac. Rep. 7.

Washington. Liability of surety on subcontractor's bond: See Pacific B. Co. v. United States F. & G. Co., 33 Wash. 47, 73 Pac. Rep. 772.

Where a bond is for the performance of a contract to deliver a building free from all liens, claims, and demands, expenses incurred by the obligee, for services of attorneys and other expenses in defending actions to foreclose liens, are not chargeable against the sureties, when the owner was to pay twenty-five per cent of the contract price thirty-five days after the completion of the structure, and before the expiration thereof it was held that he could ascertain the amount of liens claimed thereon and satisfy them by appropriating the money in the owner's hands therefor.[47] But, it has been seen, notwithstanding this decision, that there is no obligation on the part of the owner to determine at his own risk the validity of such liens.[48]

Excess of cost on abandonment. Where a material-man gives a bond to furnish certain materials to the contractor, and his contract provides that the contractor can pay in advance of delivery, but the materials should be acceptable to the architects before payment, the contractor can recover the difference between the contract price and the price paid in open market for the materials, to the extent of the undertaking; and it is no defense that the architects did not accept the materials, and that the contractor made advances to the material-man to enable him to properly manufacture the materials, the obligors not being injuriously affected, and the money paid by the contractor being mere voluntary

Interest as damages in action on bond of judgment against one of joint sureties, bond being joint and several: See Spokane & I. L. Co. v. Loy, 21 Wash. 501, 58 Pac. Rep. 672.

Objection to items of damage not in bill of particulars: See Spokane & I. L. Co. v. Loy, 21 Wash. 501, 58 Pac. Rep. 672.

Question of surety's liability, and amount thereof, for jury: See Spokane & I. L. Co. v. Loy, 21 Wash. 501, 58 Pac. Rep. 672.

[47] Alcatraz M. & H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 85 Pac. Rep. 156, 158.

[48] See §§ 535 et seq., ante.

Oregon. Bond conditioned to keep building free from liens; damages, owner's costs and expenses in defending foreclosure suits: See Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.

Washington. Failure to defend suits, neglect to pay liens, the owner entitled to recover, in addition to the amount of the liens which he had been compelled to pay, his reasonable expenses, including attorneys' fees in defending such suits: Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784. **See Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.**

loans to the material-man, and no recovery being sought on account of them.[49]

Extras. Amounts which are paid by the owner, in addition to the contract cost, for correcting imperfections in the work of a contractor, who abandoned his contract, the work being completed by another contractor, the latter not being bound to know of defects that were not apparent to a competent and careful observer, or which were not called to his attention at the time he entered into his contract, are for extra work, and the sureties of the first contractor are chargeable therefor; and the same rule applies to defective material.[50]

§ 626. Bond of contractor on public work. Where a contractor for a public-school house gives a bond to secure its performance, providing that all persons furnishing material or labor should be paid, and containing a recital that it is for a valuable consideration, and that the bond shall inure to the benefit of all such persons, and guaranteeing such payment, it is independent of the mechanic's-lien statute. The sureties are estopped from claiming that the bond is not such an undertaking as is required by the statute, the bond not being prohibited, nor against public policy or good morals, nor in contravention of any statute.[51]

[49] Bateman Bros. v. Mapel, 145 Cal. 241, 244, 78 Pac. Rep. 734.

Colorado. Measure of damages in action on bond as against contractor, the difference between the amount paid to the contractor and the value of improvements placed upon the property by him: See Routt v. Dils (Colo., May 6, 1907), 90 Pac. Rep. 67, 68; O'Driscoll v. Doyle, 31 Colo. 193, 73 Pac. Rep. 27.

[50] Long Beach School Dist. v. Dodge, 135 Cal. 401, 406, 67 Pac. Rep. 499. See Long Beach School Dist. v. Lutge, 129 Cal. 409, 62 Pac. Rep. 36.

Oklahoma. Failure to complete contract within the time specified in contract is not abandonment of the work for which damages, under the contract, should be allowed: American S. Co. v. Scott (Okl., Feb. 14, 1907), 90 Pac. Rep. 7.

[51] Union S. M. Works v. Dodge, 129 Cal. 390, 394, 62 Pac. Rep. 41. See People's L. Co. v. Gillard, 136 Cal. 55, 58, 68 Pac. Rep. 576.

Bond of contractor on state building: See Stats. 1875-76, p. 427, **§ 4, Henning's General Laws,** p. 1092. See also "Notice," §§ 547 et seq., ante, and "Public Contract," §§ 192, 257, ante.

Utah. Mechanic's lien cannot be filed on public building without express statutory permission: See Smith v. Bowman, 88 Pac. Rep. 687, 9 L. R. A. (N. S.) 889.

It is not necessary for a material-man to first sue a school board for materials sold and delivered to the contractor for a schoolhouse, but the contractor's sureties are directly liable therefor when their undertaking secures the payment for such materials; and the fact that the board had funds on hand, more or less, at any given time, applicable to payment therefor, is no defense.[52]

Bond by trustees of State Agricultural College, securing payment for material and labor used in construction of public building, valid, and enforceable by beneficiaries: Smith v. Bowman (Utah, Jan. 15, 1907), 88 Pac. Rep. 687, 9 L. R. A. (N. S.) 889.

Liability of sureties: See Montgomery v. Rief, 15 Utah 495, 50 Pac. Rep. 623.

Who may resort to bond. Persons performing labor upon or furnishing materials for a public building, not being entitled to a lien upon the property, a bond, conditioned for the payment of the penal sum to all persons who may become entitled to liens, cannot be extended by implication beyond its terms to the payment of claims for such material or labor, under the rule that the liability of sureties cannot be extended by implication beyond the terms of their contract: Smith v. Bowman (Utah, Jan. 15, 1907), 88 Pac. Rep. 687, 9 L. R. A. (N. S.) 889.

Washington. Bond given by contractor on public work: See Crane Co. v. Ætna I. Co., 43 Wash. 516, 86 Pac. Rep. 849.

Bond on public contract: See Spokane & I. L. Co. v. Loy, 21 Wash. 501, 58 Pac. Rep. 672.

[52] People's L. Co. v. Gillard, 136 Cal. 55, 62. 68 Pac. Rep. 576.

CHAPTER XXXI.

WAIVER, FORFEITURE, AND RELEASE OF LIEN.

§ 627. Waiver of lien. General principle.
§ 628. Same. Statutory provision.
§ 629. Same. Knowledge of lack of authority of employer.
§ 630. Same. Taking additional security.
§ 631. Same. Entry of judgment.
§ 632. Forfeiture by false or excessive claim or notice.
§ 633. Same. Illustrations.
§ 634. Release of lien.
§ 635. Same. Composition agreement. Definition.
§ 636. Same. Agreement to assign claims to owner.
§ 637. Same. Effect of composition agreement.

§ 627. Waiver of lien.[1] General principle. It is not intended to cover the general subject of waiver. It is a gen-

[1] See "Release," §§ 634 et seq., post; "Impairment of Liens," §§ 284 et seq., ante; "Alterations of Contract," §§ 326 et seq., ante.

Extinction of lien, generally, see **Kerr's Cyc. Civ. Code,** §§ 2909 et seq., and notes. See note 41 Am. Dec. 221.

Owner cannot waive final certificate of architect, which is a condition upon which the completion payment should be made, so far as concerns sublien-holders, who have served notice by way of garnishment of the payment, under **Kerr's Cyc. Code Civ. Proc.,** § 1184; but such payment is sufficient, so far as concerns claimants who fail to give such notice: Valley L. Co. v. Struck, 146 Cal. 266, 272, 276, 80 Pac. Rep. 405, per Shaw, J. (Beatty, C. J., and Angellotti, J., specially concurring, and holding that Sweeney v. Meyer, 124 Cal. 512, 57 Pac. Rep. 479, to the contrary, should be overruled).

Lien not waived by sureties: See Ganahl v. Weir, 130 Cal. 237, 239, 62 Pac. Rep. 512.

Colorado. Waiver of lien: See Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

Hawaii. Claimant may rely upon personal liability of subcontractor, and also on lien against property: Hackfeld v. Hilo R. Co., 14 Hawn. 448, 453.

Utah. Waiver, under Rev. Stats., § 1391 (Laws 1894, ch. xli, § 8): See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360; Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605 (lien not waived by failure to be made a party).

Washington. Absence of intention to enforce lien, no waiver: See Knudson-Jacob Co. v. Brandt (Wash., Sept. 25, 1906), 87 Pac. Rep. 43; Stringham v. Davis, 23 Wash. 568, 63 Pac. Rep. 230; Blumauer v. Clock, 24 Wash. 596, 64 Pac. Rep. 844, 85 Am. St. Rep. 966. But, in the early case of Heald v Hodder, 5 Wash. 677, 32 Pac. Rep. 728, it was held that lien claimant who performs labor upon the sole credit of the contractors, and with no intent to claim a lien, waives

eral principle, where no policy of the law is violated, that a party may, by agreement, waive [2] a right created by the statute for his own benefit, and this applies to the mechanic's-lien statute also.[3]

his lien. The fact that the judgment of foreclosure was not rendered until after the time limited for the commencement of the action had expired will not defeat the lien: Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. Rep. 273 (under Gen. Stats., § 1670).

[2] See **Kerr's Cyc. Civ. Code,** §§ 3268, 3513, and notes.

[3] Bowen v. Aubrey, 22 Cal. 566, 571 (1858). See Levy v. Magnolia Lodge I. O. O. F., 110 Cal. 297, 309, 42 Pac. Rep. 887.

Distinguished: Griffith v. New York Life Ins. Co., 101 Cal. 627, 641, 36 Pac. Rep. 113, 4 Am. St. Rep. 96.

See **Kerr's Cyc. Civ. Code,** § 3268, and note.

Under act of 1856, which required liens to be exhibited within a certain time, or be deemed waived, it was held that the act applied to liens created under the act, and not to other liens: Whitney v. Higgins, 10 Cal. 547, 551, 70 Am. Dec. 748.

Montana. See Miles v. Coutts, 20 Mont. 47, 49 Pac. Rep. 393; Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054, 1056; Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594.

Nevada. Under the act of 1875, claimants were obliged to prove up their claims in an action pending, or be held to have waived them: Hunter v. Truckee Lodge, 14 Nev. 24, 29.

Oregon. Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 75 Am. St. Rep. 574. A waiver of all claims for materials furnished the contractors is equivalent to the waiver of the right or privilege of claiming a lien therefor; and where an owner relies on a waiver of a subclaimant, and pays the balance due to the contractor, as against the owner, such waiver is not void as a unilateral agreement: Id. And in the same case it is held that the right to claim a mechanic's lien for building material is not an interest in land, which, under the statute of frauds, the agent of the material-man cannot waive without written authority from the principal; and that where the agent has authority to represent the principal in carrying on the business of manufacturing and selling lumber and in filing mechanics' liens, the agent's waiver of a mechanic's lien for lumber sold by him for the principal is binding upon the principal. Any contract or agreement inconsistent with the existence of lien is deemed such waiver: Gray v. Jones, 47 Oreg. 40, 81 Pac. Rep. 813. Where the legal ownership of the land and the absolute ownership of the lien become vested in the same person, the intention governs the merger in equity. If this intention has been expressed, it controls. In the absence of such an expression, the intention will be presumed from what appear to be the best interests of the party, as shown by the circumstances: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 275, 76 Am. St. Rep. 454.

See §§ 586 et seq., ante, and "Rights of Owner," §§ 510 et seq., ante.

Utah. Dwyer v. Salt Lake City Mfg. Co., 14 Utah 339, 47 Pac. Rep. 311 (stipulation with the vendee of the premises that claimant will look to some other person for the payment of his claims for services performed thereon, and that all the claims have been paid).

Washington. Stringham v. Davis, 23 Wash. 568, 63 Pac. Rep. 230. See Campbell v. Vincent, 8 Wash. 650, 36 Pac. Rep. 685; Maris v. Clevenger, 29 Wash. 395, 69 Pac. Rep. 1089 (loggers' liens).

§ 628. **Same. Statutory provision.** Under the present statute it is not competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of their contract to that effect is null and void.[4]

[4] **Kerr's Cyc. Code Civ. Proc.,** § 1201. See Whittier v. Wilbur, 48 Cal. 175, 177.

See §§ 510 et seq., ante.

Non-statutory original contract. As to whether this rule is applicable to non-statutory original contracts, see Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. Rep. 932. And see "Impairment of Liens," §§ 284 et seq., ante.

Under statute of 1858 it was held that where a contractor expressly, by his valid contract, waived his right to the lien, his subcontractor could not claim any such right, there being nothing in the statute prohibiting such forfeiture: Bowen v. Aubrey, 22 Cal. 566, 571 (1858).

See Dore v. Sellers, 27 Cal. 588, 593.

Colorado. It was intimated that the contractor could not cut off the right of the subcontractor to a lien by the original contract, at least not unless such was the clear intention: Jarvis v. State Bank, 22 Colo. 309, 45 Pac. Rep. 505, 55 Am. St. Rep. 129.

A provision in a contract that the original contractor would not suffer any liens to be pleaded, set up, or asserted by any subclaimant, or if so done, would cause the same to be satisfied and canceled of record, is not a waiver of the contractor's lien: Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

See "Sureties," §§ 605 et seq., ante.

There may be a question whether or not the contractor may, merely by his contract with the owner, waiving his right to a lien, cut off the right of a subcontractor: Aste v. Wilson, 14 Colo. App. 323, 59 Pac. Rep. 846.

Montana. Same ruling as text, independent of statute: Miles v. Coutts, 20 Mont. 47, 49 Pac. Rep. 393 (the case refers to the Pennsylvania rule followed in Dore v. Sellers, 27 Cal. 588, 593; but follows Whittier v. Wilbur, 48 Cal. 175, 177).

Nevada. Lien not waived, where the contract provides that title remain in vendor of machinery until payments fully made: See Salt Lake H. Co. v. Chainman M. & E. Co., 128 Fed. Rep. 509, 137 Fed. Rep. 632.

New Mexico. Voluntary deed of trust to third party for payment of lien claim does not bind claimant, and is waiver of lien, unless so expressly excepted by claimant: Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087, 1089.

Oregon. Waiver of lien by original contractor, by covenant in contract, that he will not allow "any lien or liens" to be filed, and that the premises shall be at all times free from any and all liens: Gray v. Jones, 47 Oreg. 40, 81 Pac. Rep. 813; Hand M. Co. v. Marks, 36 Oreg. 523, 52 Pac. Rep. 512, 53 Id. 1072, 59 Id. 549; Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 L. R. A. 789.

See §§ 255 et seq., ante.

§ 629. Same. Knowledge of lack of authority of employer. Where the credit is given to the person who is known by the claimant to have no authority from the owner, and there is no estoppel present, it may be considered a waiver of the lien.[5] A contractor's surety may be regarded as waiving his lien, rather than as being estopped to assert one, as the elements of equitable estoppel are not present.

§ 630. Same. Taking additional security. The fact that the claimant has another lien, or that a note and mortgage were to be given for a part of the contract price under the contract,[6] or that an order was given to the subclaimant,[7] is not thought to operate as a waiver of the lien.

The acceptance of a note for an antecedent debt, generally speaking, does not operate to discharge or extinguish the

[5] Ayers v. Green Gold M. Co., 116 Cal. 333, 336, 48 Pac. Rep. 221; Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83.

See "Agency," §§ 572 et seq., ante.

Washington. As to waiver of lien by giving credit solely to contractor, see Huttig Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 126, 32 Pac. Rep. 1073.

[6] See O'Connor v. Dingley, 26 Cal. 11, 18; Skym v. Weske Cons. Co. (Cal., Dec. 18, 1896), 47 Pac. Rep. 116.

See, generally, waiver of lien by taking notes or other securities, note 41 Am. St. Rep. 761.

Colorado. Claimant may abandon his lien claim at any time before judgment, and proceed by attachment, as in any action on contract: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 53.

New Mexico. Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

The lien is lost, where collateral security is taken, under Comp. Laws, § 2235; but a note is not such collateral security: Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284.

Oregon. Contra: Trullinger v. Kofoed, 7 Oreg. 228, 33 Am. St. Rep. 708 (for whole contract price).

Utah. Institution of an attachment suit and levy of the writ is not a waiver of the lien: Salt Lake L. Co. v. Ibex M. & S. Co., 15 Utah 440, 49 Pac. Rep. 768, 62 Am. St. Rep. 944.

[7] Adams v. Burbank, 103 Cal. 646, 648, 37 Pac. Rep. 640; Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394.

Under act of 1856, a party, having secured a mechanic's lien under the statute, did not forfeit or waive it by causing an attachment to be levied upon the property of the debtor to secure the same demand: Brennan v. Swasey, 16 Cal. 140, 142, 76 Am. Dec. 507.

See §§ 602 et seq., ante.

Nevada. Skyrme v. Occidental M. Co., 8 Nev. 219 (note).

Washington. And the assignment of the moneys to be paid (by way of an accepted order), as security, will not be a waiver of his lien: Potvin v. Denny Hotel Co., 9 Wash. 316, 37 Pac. Rep. 320, 38 Pac. Rep. 1002.

debt, unless it is received by express agreement as payment; and in such case the right of action on the debt is merely suspended until the maturity of the note, and suit may be brought on the original debt in case of the non-payment of the accepted note.[8]

Where a material-man gives a receipt expressly stating the receipt of "payment by note," it is prima facie, though not conclusive, evidence that the note was taken as payment of the debt, and the lien is waived.[9]

By giving orders on a mining company for portions of the amount due, a miner is not divested of his right to his lien for labor, where the orders were not received by the transferee in payment of his demand against the lien claimant nor paid nor accepted by the mining company, but returned to the lien claimant before the filing of his claim of lien.[10]

§ 631. **Same. Entry of judgment.** Under the present California code,[11] the right of personal action is preserved against the one personally liable.

In an early case it was held that a claimant does not lose or waive his lien by commencing and prosecuting to judgment an action against the owners for the indebtedness to secure which the claim of lien was filed, the court saying, "'There are two controlling reasons why a mechanic's lien will not be destroyed by the entry of a judgment. First, because there is merger of the claim, and not of the security. The first we have already considered; the second is fully set forth by the supreme court of Pennsylvania, in the case of John Thompson, substantially as follows: Whenever the law works an extinguishment, the creditor has gained a higher security; the thing substituted is more beneficial to the creditor than the thing contracted for. Now, the debts of the mechanic or material-man were originally simple contract

[8] Jenne v. Burger, 120 Cal. 444, 447, 52 Pac. Rep. 706. See Griffith v. Grogan, 12 Cal. 317; Smith v. Owens, 21 Cal. 11; Welch v. Allington, 23 Cal. 322; Brown v. Olmstead, 50 Cal. 162; Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 Pac. Rep. 28.

New Mexico. Mountain E. Co. v. Miles, 9 N. M. 512, 56 Pac. Rep. 284 (note).

[9] Jenne v. Burger, 120 Cal. 444, 447, 52 Pac. Rep. 706.

[10] Palmer v. Uncas Min. Co., 70 Cal. 614, 615, 11 Pac. Rep. 666.

[11] Kerr's Cyc. Code Civ. Proc., § 1197.

debts, but for their security the act has created a lien on the building, so that the security which the creditors have in relation to the safety of the debts ranks with that of a judgment or mortgage. Therefore the acceptance of a bond and warrant of attorney, and the entering of a judgment on the bond, it not a waiver or extinguishment of a mechanic's lien.' The rule seems to us not only reasonable and just, but in accordance with the analogies of the law in cases of mortgages, pledges, etc., and we have been referred to no authority to the contrary." [12]

The right to a money judgment against the person who employed the mechanic, or who purchased the materials, on the other hand, is not lost nor waived by a proceeding to enforce the lien, or in an attempt to recover from the owner the balance of the contract price remaining in his hands.[13]

§ 632. Forfeiture by false or excessive claim or notice.[14] Statutory provisions. It has already been seen that the lien is not forfeited by mere misstatement of the amount due, in the absence of fraud.[15]

[12] Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 355, 356.

Colorado. The recovery of a judgment for a debt does not bar an action to foreclose a lien for the same debt: Marean v. Stanley, 5 Colo. App. 335 (1889). "It would seem, upon principle and authority, that nothing short of the payment of the debt by satisfaction of the judgment would extinguish the right to enforce the lien against the security": Id. 337 (Gen. Stats., § 2161, expressly reserved all other remedies).

Utah. But see Garland v. Bear Lake & R. W. & I. Co., 9 Utah 350, 34 Pac. Rep. 368.

[13] Bates v. Santa Barbara County, 90 Cal. 543, 548, 27 Pac. Rep. 438.

See **Kerr's Cyc. Code Civ. Proc.,** § 1197, and note; "Cumulative Remedies," §§ 638 et seq., post; "Obligations of Owner," §§ 523 et seq., ante.

Colorado. Remedy under a contract not affected by a lien or judgment thereon: See American Nat. Bank v. Barnard, 15 Colo. App. 110, 61 Pac. Rep. 200.

Idaho. Waiver by coming into court of equity and asking that claim be paid out of the purchase price on sale on judgment on prior lien: See Idaho G. M. Co. v. Wincheil, 6 Idaho 729, 59 Pac. Rep. 533, 96 Am. St. Rep. 290.

[14] **Montana.** No court of equity ought, in the absence of an express and positive statute, to hold that a person claiming a lien for more than he was entitled, lost his lien, unless it clearly appeared that there was some fraud connected therewith: Nolan v. Lovelock, 1 Mont. 224, 229; Mason v. Germaine, 1 Mont. 263, 271; Black v. Appolonio, 1 Mont. 342.

[15] See §§ 412 et seq., ante.

Claim of lien. A recently enacted provision [16] enunciates the general law as follows: "No mistakes or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits, and offsets, or of the balance due, was made with the intent to defraud."

The statute [17] provides that "any person who shall wilfully include in his claim filed under section eleven hundred and eighty-seven, work or materials not performed upon or furnished for the property described in the claim, shall forfeit his lien."

As to notice to owner. The provision of the code [18] is: "Any person who shall wilfully give a false notice of his claim to the owner under the provisions of section eleven hundred and eighty-four, shall forfeit his lien." It is not clear whether section twelve hundred and three a, passed in 1907, has any application to the notice to owner provided for in section eleven hundred and eighty-four. This provision seems to be applicable only to the notice to the owner, discussed in a preceding part of this work, and not to the claim of lien.[19]

Construction. The provisions of section twelve hundred and two, above quoted, are penal in their character, and must be strictly construed,[20] and the evidence should be clear and convincing that the violation was wilful.[21]

[16] **Kerr's Stats. and Amdts. 1906-07,** p. 482; **Kerr's Cyc. Code Civ. Proc.,** § 1203a.

[17] **Kerr's Cyc. Code Civ. Proc.,** § 1202.

Hawaii. Abandonment of contract by contractor may work forfeiture of his right to lien without working forfeiture of that of material-man: Pacific H. Co. v. Lincoln, 12 Hawn. 358, 361.

[18] **Kerr's Cyc. Code Civ. Proc.,** § 1202.

[19] See "Notice," §§ 547 et seq., ante; Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 366, 27 Pac. Rep. 743.

[20] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 365, 27 Pac. Rep. 743; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 235, 39 Pac. Rep. 758.

See "Construction," §§ 24 et seq., ante; "Evidence," §§ 822 et seq., post.

[21] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 365, 27 Pac. Rep. 743; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 235, 39 Pac. Rep. 758; Barber v. Reynolds, 44 Cal. 519, 533 (under § 11 of the act of 1862; the

§ 633. **Same. Illustrations.** The subject of forfeiture having already been considered to some extent,[22] we shall at this time content ourselves with a few illustrations of the general rule.

Excessive material. Excessive price. Where the claim filed contains no articles, except such as are the subject of lien, the bare fact that a claimant has filed a claim for too much lumber, or set too high a price on it, would not, in the absence of fraud, defeat his right to foreclose the lien for so much material as was actually used in the improvement.[23]

Non-lienable materials. Although a claim of lien may be, in part, for articles not the subject of lien, the court should permit the lien claimant, by proof, to make the necessary segregation, take out the value of such articles, and declare a lien for the balance, unless there is something to show a

court saying, "There is no such discrepancy appearing here between the liens claimed and the amounts adjudged to have been really due, as would suggest a doubt as to the good faith of the parties filing their claims under the statute"). And where the record does not contain any evidence concerning the claim, a finding of the court in favor of the validity of the notice will not be set aside upon a mere surmise that the statute was wilfully and intentionally violated: Pacific Mut. L. Ins. Co. v. Fisher, supra.

See "Evidence," §§ 822 et seq., post.

Montana. Mason v. Germaine, 1 Mont. 271.

[22] **Kerr's Cyc. Code Civ. Proc.**, §§ 412 et seq., ante.

[23] Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 619, 25 Pac. Rep. 124. See Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 78 Pac. Rep. 21.

Colorado. See Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456.

New Mexico. Springer L. Assoc. v. Ford, 168 U. S. 513, bk. 42 L. ed. 562, 18 Sup. Ct. Rep. 170.

Oregon. Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192. So an innocent mistake in addition will not vitiate the lien: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 170, 44 Pac. Rep. 390. So where the claim did not allow sufficient credit, it being done in good faith: Rowland v. Harmon, 24 Oreg. 529, 34 Pac. Rep. 357; Ainslie v. Kohn, 16 Oreg. 363, 375, 19 Pac. Rep. 97.

The general rule, in the absence of statute, being that where, in the claim filed, there is an honest mistake in the amount or price of labor, or the quantity or value of material furnished, about which there might be a difference of opinion, requiring evidence to ascertain the truth of the facts, it will not defeat the lien: Nicolai v. Van Fridagh, 23 Oreg. 149, 31 Pac. Rep. 288.

Washington. Too much material: Whittier v. Stetson & P. M. Co., 6 Wash. 190, 33 Pac. Rep. 393, 36 Am. St. Rep. 149; Peterman v. Milwaukee B. Co., 11 Wash. 199, 39 Pac. Rep. 452. See Bolster v. Stocks, 13 Wash. 460, 469, 43 Pac. Rep. 532, 534, 1099. And see Dexter, H. & Co. v. Sparkman, 2 Wash. 165, 25 Pac. Rep. 1070; Dexter, H. & Co. v. Wiley, 2 Wash. 171, 25 Pac. Rep. 1071.

wilful attempt to claim for non-lienable items or to assert a wilfully false claim.[24]

§ 634. **Release of lien.** The general subject of release will not be here considered.[25]

A release obtained by fraud, from one who was only interested in a share of the profits of the contract, has no effect upon another's interest.[26]

§ 635. **Same. Composition agreement. Definition.** A composition agreement is a contract made upon a sufficient consideration, between an insolvent or embarrassed debtor

[24] Gordon H. Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 622, 25 Pac. Rep. 125; Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772; Snell v. Payne, 115 Cal. 218, 222, 46 Pac. Rep. 1069 ("it must be so wilfully false as to amount to a fraud"). See Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 72 Pac. Rep. 21.

Nevada. The mere fact that charges have been included in the statement for which the law allows no lien will not defeat the portion for which a lien is given, when the charges are separately stated: Maynard v. Ivey, 21 Nev. 241, 29 Pac. Rep. 1090.

Oregon. Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192; Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 44 Pac. Rep. 390; Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54. See Getty v. Ames, 30 Oreg. 573, 48 Pac. Rep. 515, 60 Am. St. Rep. 835; Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454. This is the rule if they are susceptible of being segregated: Cochran v. Baker, 34 Oreg. 555, 56 Pac. Rep. 641. But where the items for which a lien is given cannot be segregated upon the face of the claim from those for which a lien is not given, the lien is lost: Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 75 Am. St. Rep. 574; Williams v. Toledo Coal Co., 25 Oreg. 426, 36 Pac. Rep. 159, 42 Am. St. Rep. 799; Dalles L. Co. v. Wasco Mfg. Co., 3 Oreg. 527; Kezartee v. Marks, 15 Oreg. 529, 16 Pac. Rep. 407.

Washington. So where a claim stated that certain material was furnished, specifying the wrong kind by mistake, the amount not being increased: Bolster v. Stocks, 13 Wash. 460, 468, 43 Pac. Rep. 532, 534, 1099.

[25] See **Kerr's Cyc. Civ. Code,** §§ 1541 et seq., and notes.

See "Waiver and Forfeiture," §§ 527 et seq., ante.

Note for release of sureties' lien without consideration: Blyth v. Robinson, 104 Cal. 239, 242, 37 Pac. Rep. 904.

See "Sureties," §§ 605 et seq., ante.

Release of assignor of contract: See "Assignees," §§ 588 et seq., ante.

Nevada. Unsatisfied judgment against agent, no release: Dickson v. Corbett, 11 Nev. 277.

Washington. Release as to one of several houses: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720.

[26] South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, bk. 18 L. ed. 894.

and his creditors, or a considerable proportion of them, whereby the latter, for the sake of immediate or earlier payment, agree to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole.[27]

§ 636. **Same. Agreement to assign claims to owner.** In view of the definition given in the last preceding section, a contract that is not one for the payment by the debtor of any sum or thing, and does not purport to be, and is not intended as, a release of the debtor, is not technically a composition agreement. Such an agreement is one where the owner contracts to pay the money still due to the contractor, first paying all the claims for labor in full, and the remainder among all the other lien claimants, in proportion to the whole amount of such claims, and the claimants agree to assign their claims to the owner, and if any claimant should refuse to accept his proportion, to prove their claims valid or return the amount paid. Such an agreement does not amount to an accord, but constitutes a valid and binding agreement. Where the lien claimants thus mutually agree to forego their right to pursue the usual method of enforcing their demands in consideration of being paid at a given time, the engagement of each is a sufficient consideration for the engagement of the others to do the same, and the owner's acceptance of the contract, and his payment thereunder, are a sufficient consideration to support the agreement of the claimants.[28]

Pro rata amount left blank. The fact that, in such an agreement, blanks are left therein, relative to the pro rata to be paid the lien claimants, does not make the agreement incomplete, as the contract affords the means of supplying the blanks with certainty, namely, the amount due from the owner to be applied ratably among demands of record, and especially where the amount was known to the parties at the time of making the agreement. Moreover, if such agreement simply is to divide the sum due from the owner of the build-

[27] Wilson v. Samuels, 100 Cal. 514, 518, 35 Pac. Rep. 148. See § 67 of the Act to Establish a Uniform System of Bankruptcy throughout the United States, approved July 1, 1898, 1 Fed. Stats. Ann. 688.

[28] Wilson v. Samuels, 100 Cal. 514, 518, 35 Pac. Rep. 148.

ing among the subclaimants, without other or more accurate specification, it would be ascertainable and valid, and would afford a criterion by which to ascertain the amount due, and its disposition.[29]

Such agreement does not constitute an accord between the parties, but constitutes a valid and binding agreement, authorizing the owner to disburse the fund in hand; and to permit a claimant to repudiate such an executed agreement as to all the other parties, and recover from the owner the entire sum due him from the contractor, would be to permit him to take advantage of his own wrong.[30]

Where the owner does not seek any compromise or composition of the claims for which his property is liable, and is at all times willing to pay all that he owes the contractor, in the mode provided by law, it is not for his benefit that such agreement is made, but for that of the creditors of the contractor.[31]

§ 637. **Same. Effect of composition agreement.** A composition agreement, executed by claimant and other creditors of the contractor, agreeing to release the contractor and owner upon the terms specified, operates to extinguish the liability which the lien was filed to secure, and the consideration therefor consists of the mutual promises of the signing creditors to take something less than or different from what they were entitled to under their previous contracts.[32]

All of the creditors need not sign such an agreement, to make it valid, in the absence of a condition in the contract to that effect; but it is sufficient if two or more sign the same, the signature and promise of each being sufficient consideration for the agreement of the others.[33]

[29] Wilson v. Samuels, 100 Cal. 514, 518, 35 Pac. Rep. 148.

[30] Wilson v. Samuels, 100 Cal. 514, 518, 35 Pac. Rep. 148; Schroeder v. Pissis, 128 Cal. 209, 213, 60 Pac. Rep. 758. See § 637, post.

[31] Wilson v. Samuels, 100 Cal. 514, 519, 35 Pac. Rep. 148.

[32] Schroeder v. Pissis, 128 Cal. 209, 213, 60 Pac. Rep. 758.

[33] Schroeder v. Pissis, supra. See § 636, ante.

Modifying agreement of composition by oral qualification and conditions to the written contract: See Schroeder v. Pissis, 128 Cal. 209, 213, 60 Pac. Rep. 758.

Oregon. Release by contractor of all claims against owner for breach of contract: Hand M. Co. v. Marks, 36 Oreg. 523, 59 Pac. Rep. 549, 552.

PART II.

PLEADING AND PROCEDURE.

CHAPTER XXXII.

REMEDIES.

§ 638. Cumulative remedies. Personal action.
§ 639. Same. Election, when several suits commenced.
§ 640. Same. Nature of action to foreclose lien.
§ 641. Same. Actions by original contractor.
§ 642. Same. Actions by subclaimants.
§ 643. Same. Actions by owner's laborers and material-men.
§ 644. Same. Actions by owner.
§ 645. Provisional remedies. Statutory provision.
§ 646. Same. Attachment.
§ 647. Same. Materials exempt from attachment.
§ 648. Same. Injunction.

§ 638. Cumulative remedies. Personal action. Generally speaking, an action in personam lies by the lien claimant against the person liable, under the general principles of contract.[1]

[1] Central L. & M. Co. v. Center, 107 Cal. 193, 197, 40 Pac. Rep. 334; Bates v. Santa Barbara County, 90 Cal. 543, 547, 27 Pac. Rep. 438; McMenomy v. White, 115 Cal. 339, 343, 47 Pac. Rep. 109; **Kerr's Cyc. Code Civ. Proc.,** § 1197, and note. See Marchant v. Hayes, 117 Cal. 669, 671, 49 Pac. Rep. 840, s. c. 120 Cal. 137, 139, 52 Pac. Rep. 154.

See "Liability of Owner," §§ 523 et seq., ante; "Liability of Contractor," §§ 64 et seq., ante; "General Rights of Original Contractor," §§ 61 et seq., ante.

Cumulative remedies: See Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

Montana. O'Rourke v. Butte Lodge, 19 Mont. 541, 48 Pac. Rep. 1106.

Splitting demands: See Boucher v. Powers, 29 Mont. 342, 74 Pac. Rep. 942.

Oregon. At law: Willamette L. Co. v. McLeod, 27 Oreg. 272.

Utah. Remedial provisions liberally construed: Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605, 607.

Washington. Potvin v. Wickersham, 15 Wash. 646, 647, 47 Pac. Rep. 25. See Peterman v. Milwaukee B. Co., 11 Wash. 199, 200, 39 Pac. Rep. 452; Fairhaven L. Co. v. Jordan, 5 Wash. 729, 736, 32 Pac. Rep. 729.

Express contract. Common counts. A valid contract between the owner and the contractor may be sued on specially, without foreclosing the lien, or the common counts in assumpsit may be used, in accordance with the general rules applicable to such counts.[2]

Where the remedies given are cumulative, both may be pursued at the same time.[3] But there can be but one satisfaction of the claim, with costs and counsel fees, when allowed.[4]

§ 639. **Same. Election, when several suits commenced.** In case of an attempt to pursue cumulative remedies in separate actions, such as an action to foreclose the lien upon the property, and a suit upon the account with an attachment, plaintiff may be put to his election.[5]

[2] Castagnino v. Balletta, 82 Cal. 250, 256, 23 Pac. Rep. 127.

See "Pleadings," §§ 670 et seq., post.

Action on quantum merult, based upon request: De Prosse v. Royal E. D. Co., 135 Cal. 408, 410, 67 Pac. Rep. 502.

[3] **Kerr's Cyc. Code Civ. Proc.,** §§ 1197, 1203; Brennan v. Swasey, 16 Cal. 140, 142, 76 Am. Dec. 507; Bates v. Santa Barbara County, 90 Cal. 543, 548, 27 Pac. Rep. 438.

See "Waiver of Lien," §§ 627 et seq., ante.

Colorado. Marean v. Stanley, 5 Colo. App. 335, 38 Pac. Rep. 395.

Hawaii. Election of remedies: See Bierce v. Hutchins, 16 Hawn. 418, 717.

Montana. O'Rourke v. Butte Lodge, 19 Mont. 541, 48 Pac. Rep. 1106; American S. & L. Assoc. v. Burghardt, 17 Mont. 545, 43 Pac. Rep. 923.

Personal judgment allowed in action to foreclose lien: Western P. Co. v. Fried, 33 Mont. 7, 81 Pac. Rep. 394, 114 Am. St. Rep. 799. See Goodrich L. Co. v. Davie, 13 Mont. 76, 32 Pac. Rep. 282; Aldritt v. Panton, 17 Mont. 187, 42 Pac. Rep. 767; Riale v. Roush, 1 Mont. 474.

Utah. But see Garland v. Irrigation Co., 9 Utah 350, 34 Pac. Rep. 368.

Washington. Potvin v. Wickersham, 15 Wash. 646, 647, 47 Pac. Rep. 25.

[4] **Kerr's Cyc. Code Civ. Proc.,** § 1203.

As to bond, see Malone v. Big Flat G. M. Co., 76 Cal. 578, 586, 18 Pac. Rep. 772.

Colorado. Marean v. Stanley, 5 Colo. App. 335, 38 Pac. Rep. 395; but compare Orman v. Ryan, 25 Colo. 383, 55 Pac. Rep. 168.

[5] Brennan v. Swasey, 16 Cal. 140, 142, 76 Am. Dec. 507.

Attachment for money due is not waiver of lien, under mechanic's-lien law: Brennan v. Swasey, supra; Bates v. Santa Barbara County, 90 Cal. 543, 548, 27 Pac. Rep. 438. See Roberts v. Wilcoxson, 36 Ark. 363; Salt Lake L. Co. v. Ibex M. & S. Co., 15 Utah 440, 444, 49 Pac. Rep. 768.

See notes 79 Am. Dec. 277; 35 Am. St. Rep. 553.

§ 640. Same. Nature of action to foreclose lien. The action to foreclose the lien is a suit in equity,[6] and in many

Hawaii. Principles of election of remedy: See Bierce v. Hutchins, 16 Hawn. 717, 718.

Nevada. Personal judgment against agent of owner; subsequent foreclosure of lien against owner allowed: Dickson v. Corbett, 11 Nev. 277.

[6] Brock v. Bruce, 5 Cal. 279, 280; Curnow v. Happy Valley G. & H. Min. Co., 68 Cal. 262, 264, 268, 9 Pac. Rep. 149. See Worden v. Hammond, 37 Cal. 61, 65, and Barber v. Reynolds, 33 Cal. 497, 502.

Action to foreclose lien against property and fund, equitable suits: Weldon v. Superior Court, 138 Cal. 427, 429, 71 Pac. Rep. 502. See Dunlop v. Kennedy (Cal., Aug. 31, 1893), 34 Pac. Rep. 92, 95 (rehearing granted).

Suit to foreclose lien for labor on threshing-machine, suit in equity: Clark v. Brown, 141 Cal. 93, 95, 74 Pac. Rep. 548.

Actions to enforce mechanics' liens: See note 11 L. R. A. 743.

Alaska. Russell v. Hayner, 2 Alas. 703 (Dig.), 130 Fed. Rep. 90, 64 C. C. A. 424.

Colorado. Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 422; San Juan etc. Co. v. Finch, 6 Colo. 214 (prior to code); Williams v. Uncompahgre C. Co., 13 Colo. 469, 22 Pac. Rep. 806; Cary Hardware Co. v. McCarty, 10 Colo. App. 200, 208, 50 Pac. Rep. 744; Marean v. Stanley, 5 Colo. App. 335; Bradbury v. Butler, 1 Colo. App. 430, 29 Pac. Rep. 463.

Idaho. Idaho & O. L. Imp. Co. v. Bradbury, 132 U. S. 509, bk. 33 L. ed. 433, 10 Sup. Ct. Rep. 177. See Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218; Christensen v. Hollingsworth, 6 Idaho 87, 53 Pac. Rep. 211; Sandstrom v. Smith (Idaho, June 20, 1906), 86 Pac. Rep. 416.

Montana. Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678; Marsh v. Morgan, 18 Mont. 19, 44 Pac. Rep. 85; Simonton v. Kelley, 1 Mont. 483; Riale v. Roush, 1 Mont. 474; Montana O. P. Co. v. Boston & M. C. & S. Min. Co., 27 Mont. 288, 70 Pac. Rep. 1114; Gilchrist v. Helena H. S. Co. (Mont.), 58 Fed. Rep. 708; O'Rourke v. Butte Lodge, 19 Mont. 541, 48 Pac. Rep. 1106. See Marsh v. Morgan, 18 Mont. 19, 44 Pac. Rep. 85; Alvord v. Hendrie, 2 Mont. 115; Mason v. Germaine, 1 Mont. 263, 267; Mochon v. Sullivan, 1 Mont. 470, 473; Davis v. Alvord, 94 U. S. 545, bk. 24 L. ed. 283.

Fact that personal judgment is rendered for the amount due, with directions that if the same should not be satisfied out of other property of the debtor, the property upon which the lien is adjudged to exist should be sold and the proceeds applied to the payment, does not change the character of the suit from one of equitable cognizance and convert it into an action at law: Davis v. Alvord, 94 U. S. 545, bk. 24 L. ed. 283.

New Mexico. Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541; Hobbs v. Spiegelberg, 13 N. M. 363, 5 Pac. Rep. 529; Straus v. Finane, 3 N. M. 398, 5 Pac. Rep. 729; Finane v. Hotel & Imp. Co., 3 N. M. 411, 5 Pac. Rep. 725; Rupe v. New Mexico L. Assoc., 3 N. M. 397, 555, 9 Pac. Rep. 301; Houghton v. Hotel Co., 3 N. M. 419, 5 Pac. Rep. 729. See Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

Oregon. Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Id. 54; Ming Yue v. Coos Bay R. Co., 24 Oreg. 392.

Utah. Mammoth M. Co. v. Salt Lake M. Co., 151 U. S. 447, 450, bk. 38 L. ed. 229, 14 Sup. Ct. Rep. 384.

Washington. Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 718.

particulars it resembles an action to foreclose a mortgage.[7] It is also in the nature of a proceeding in rem.[8] But in this form of action questions of title cannot be adjudicated.[9]

§ 641. Same. Actions by original contractor. The original contractor has an action in personam against his employer for the contract price on a valid original contract performed by the contractor. It is only when the plan of the owner has been substantially embodied in the work that the court can have an occasion to estimate the deficiency. The authorities are very clear upon this point. There is a variety of cases to which the so-called modern equitable

Equitable in its nature: Harrington v. Miller, 4 Wash. 808, 811, 31 Pac. Rep. 325 (under § 1677); Wheeler v. Ralph, 4 Wash. 617, 630, 30 Pac. Rep. 709; Fox v. Nachtsheim, 3 Wash. 684, 29 Pac. Rep. 140; Installment B. & L. Co. v. Wentworth, 1 Wash. 467, 469, 25 Pac. Rep. 298. See Washington I. W. Co. v. Jensen, 3 Wash. 584, 28 Pac. Rep. 1019. And it cannot be converted into a suit at law by setting up a legal defense by way of counterclaim: Kilroy v. Mitchell, 2 Wash. 407, 26 Pac. Rep. 865; Installment B. & L. Co. v. Wentworth, 1 Wash. 467, 25 Pac. Rep. 298.

Wyoming. The district court had "full jurisdiction, upon its law side, to administer the mechanic's lien": Fein v. Davis, 2 Wyo. 118, 122.

[7] Whitney v. Higgins, 10 Cal. 547, 551, 70 Am. Dec. 748. See Worden v. Hammond, 37 Cal. 61, 65.

See "General Nature of Lien," § 9, ante.

New Mexico. Hobbs v. Spiegelberg, 3 N. M. 364, 5 Pac. Rep. 529.

Washington. Harrington v. Miller, 4 Wash. 808, 811, 31 Pac. Rep. 325. See Washington I. W. Co. v. Jensen, 3 Wash. 584, 28 Pac. Rep. 1019; Fox v. Nachtsheim, 3 Wash. 684, 29 Pac. Rep. 140.

[8] Van Winkle v. Stow, 23 Cal. 457; Booth v. Pendola, 88 Cal. 36, 44, 23 Pac. Rep. 200, 24 Id. 714, 25 Id. 1101.

See "Nature of Lien," § 9, ante.

Colorado. Marean v. Stanley, 5 Colo. App. 335. But is it not, as to the principal basis of the action, such a proceeding: Davis v. Mouat L. Co., 2 Colo. App. 381, 31 Pac. Rep. 187.

Montana. O'Rourke v. Butte Lodge, 19 Mont. 544, 48 Pac. Rep. 1106; Mochon v. Sullivan, 1 Mont. 470, 472.

Nevada. Under the act of 1875, it was a proceeding to enforce not only the lien of the plaintiff, but also all the recorded liens: Hunter v. Truckee Lodge, 14 Nev. 24, 29.

Oregon. Under Hill's Ann. Laws, § 3677, "a suit to enforce a particular mechanic's lien is, in effect, a proceeding to enforce the liens of all lien claimants, parties to the record": Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

Washington. Douthitt v. MacCulsky, 11 Wash. 601, 606, 40 Pac. Rep. 186; Chevret v. Mechanics' M. & L. Co., 4 Wash. 721, 31 Pac. Rep. 24.

[9] Worden v. Hammond, 37 Cal. 61, 65; Williams v. Mountaineer G. M. Co., 102 Cal. 134, 143, 34 Pac. Rep. 702, 36 Pac. Rep. 388.

rule has been applied. These have already been considered, and what was elsewhere said will not be repeated.[10]

Breach of valid contract. Where the original contract is valid, the original contractor has also an action for damages for breach of contract by the owner, and may recover the profits which he would have made had he been allowed to complete the work.[11]

Action upon implied contract. Upon a rescission by reason of a breach justifying the contractor in abandoning the contract,[12] or upon prevention of performance, he may have an action in personam on the implied contract, for the value of the work done and materials furnished.[13] Upon breach of contract by the owner, preventing performance, the contractor may treat contract as terminated, and recover profits, and the original contract is continued in force for that purpose.[14] And he may foreclose a lien upon such implied contract.[15] And the contractor, on his failure to carry out the exact terms of the valid contract, under certain cir-

[10] See "Performance," §§ 334 et seq., ante; Perry v. Quackenbush, 105 Cal. 299, 307, 38 Pac. Rep. 740; Marchant v. Hayes, 117 Cal. 669, 49 Pac. Rep. 840; Harlan v. Stufflebeem, 87 Cal. 508, 512, 25 Pac. Rep. 686.

See "Liability of Owner," §§ 523 et seq., ante; "Complaint," §§ 659 et seq., post.

Washington. The contractor who deliberately furnishes inferior materials or work cannot recover on the contract: Schmidt v. City of North Yakima, 12 Wash. 121, 40 Pac. Rep. 790.

[11] Cox v. McLaughlin, 54 Cal. 605, 606. So of breach of contract by a county: McPherson v. San Joaquin County (Cal., March 24, 1899), 56 Pac. Rep. 802. And also expenditures made in preparing to do the work: O'Connell v. Main etc. Hotel Co., 90 Cal. 515, 27 Pac. Rep. 373. As to damages arising from subcontracts, see same case.

Colorado. See Florence O. & R. Co. v. Reeves, 13 Colo. App. 95, 56 Pac. Rep. 674 (for delay and expenses).

[12] See "Abandonment," §§ 358 et seq., ante, and "Performance," §§ 334 et seq., ante.

[13] Porter v. Arrowhead R. Co., 100 Cal. 500, 502, 35 Pac. Rep. 146; Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635; Cox v. McLaughlin, 54 Cal. 605, 606; Adams v. Burbank, 103 Cal. 646, 649, 37 Pac. Rep. 640; Cox v. Western Pac. R. Co., 47 Cal. 87, 89.

See "Performance," §§ 334 et seq., ante.

Colorado. McGonigle v. Klein, 6 Colo. App. 306, 40 Pac. Rep. 465.

Action on quantum meruit: See Cox v. McLaughlin, 76 Cal. 60, 64, 18 Pac. Rep. 100, 9 Am. St. Rep. 164.

[14] McConnell v. Corona City W. Co., 149 Cal. 60, 64, 85 Pac. Rep. 929.

[15] Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 116, 38 Pac. Rep. 635. See Porter v. Arrowhead R. Co., 100 Cal. 500, 502, 35 Pac. Rep. 146; Adams v. Burbank, 103 Cal. 646, 650, 37 Pac. Rep. 640; Neihaus v Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255.

cumstances elsewhere stated, may recover on the implied contract, less damages sustained by the owner.[16]

Where the statutory original contract is void, the contractor has no action on the express contract, for damages or otherwise, against the owner;[17] but he has an action on the implied contract, in personam, against the owner, for the reasonable value of the labor performed and materials furnished; the owner deriving a benefit thereby.[18] Under such void contract, however, he has no action to foreclose a lien on the implied contract.[19]

Against subclaimants. The contractor also has an action against subclaimants for breach of the contract between himself and such subclaimants.[20]

§ 642. **Same. Actions by subclaimants.** Subclaimants have an action in personam against the contractor,[21] subcontractor,[22] or person with whom they contracted, on the contract, or for breach of it;[23] and, under the general prin-

[16] Perry v. Quackenbush, 105 Cal. 299, 307, 38 Pac. Rep. 740.
See "Performance," §§ 334 et seq., ante.

[17] Palmer v. White, 70 Cal. 220, 11 Pac. Rep. 647. See Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 394, 30 Pac. Rep. 564.

[18] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 394, 30 Pac. Rep. 564; Spinney v. Griffith, 98 Cal. 149, 154, 32 Pac. Rep. 974; Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412; Covell v. Washburn, 91 Cal. 560, 27 Pac. Rep. 859; Morris v. Wilson, 97 Cal. 644, 647, 32 Pac. Rep. 801; Kuhlman v. Burns, 117 Cal. 469, 49 Pac. Rep. 585; Marchant v. Hayes, 117 Cal. 669, 672, 49 Pac. Rep. 840. See Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. Rep. 655, 13 L. R. A. 418.
See §§ 523 et seq., and "Effect of Void Contract," §§ 319 et seq., ante.

[19] Spinney v. Griffith, 98 Cal. 149, 154, 32 Pac. Rep. 974. But see Cummings v. Ross, 90 Cal. 68, 71, 27 Pac. Rep. 62, where an action upon an implied contract was allowed in the case of a non-statutory original contract, void by reason of fraud.

[20] See §§ 61 et seq., ante.

[21] **Utah.** See Garland v. McMartin, 8 Utah 150, 30 Pac. Rep. 365.
Washington. Potvin v. Wickersham, 15 Wash. 646, 47 Pac. Rep. 25; and where copartners enter into the original contract, the subsequent withdrawal of one of the partners does not relieve the contractor from liability: Stetson & P. M. Co. v. McDonald, 5 Wash. 496, 32 Pac. Rep. 108.

[22] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860. See McMenomy v. White, 115 Cal. 339, 343, 47 Pac. Rep. 109; Marchant v. Hayes, 120 Cal. 137, 139, 52 Pac. Rep. 154; Humboldt L. M. Co. v. Crisp, 146 Cal. 686, 688, 81 Pac. Rep. 30, 106 Am. St. Rep. 75, 2 Am. & Eng. Ann. Cas. 811.

[23] See "Rights of Subcontractors," §§ 70 et seq., ante; "Materialmen," § 101, ante; "Laborers," §§ 112 et seq., ante.
Montana. See Gilliam v. Black, 16 Mont. 217, 40 Pac. Rep. 303.

ciples of contracts, upon rescission or breach of their own contracts, they may sue such person in personam on the implied contract for the reasonable value of the labor or materials.[24]

Subclaimants, under a valid contract, also have an action against the owner to foreclose a lien upon the property, to the extent of the amount due the contractor at the time of filing the claim of lien,[25] or of service of notice on the owner;[26] and to foreclose a lien upon the fund, or in personam against the owner or employer, to the extent of the amount due at the time of such service, or to become due thereafter.[27]

Under a void contract, or where the provisions of section eleven hundred and eighty-four of the Code of Civil Procedure, as to payments, have not been substantially complied with, subclaimants have an action to foreclose a lien for the value of the labor done or materials furnished, independently of the amount due the contractor;[28] and an action to foreclose a lien upon the fund, or in personam against the owner or employer, to the extent of the amount due at the time of the service of the notice.[29]

§ 643. **Same. Actions by owner's laborers and material-men.** The owner's laborers and material-men, being in privity with the owner or employer, have a right of action in personam against the person so contracting with them,[30] and also a right of action to foreclose the lien on the property.[31]

[24] See §§ 334 et seq., ante.

Action for damages for failure to give bond, under § 1203 of the Code of Civil Procedure (held unconstitutional): See Gibbs v. Tally, 63 Pac. Rep. 168, **reversed** 133 Cal. 373, 65 Pac. Rep. 570.

[25] "Obligations of Owner," §§ 523 et seq., ante; "Notice," §§ 547 et seq., ante; "Validity of Contract," §§ 315 et seq., ante.

[26] See §§ 547 et seq., ante.

[27] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45; Bates v. Santa Barbara County, 90 Cal. 543, 547, 27 Pac. Rep. 438; Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536.

[28] §§ 559 et seq., ante.

[29] See §§ 547 et seq., ante.

[30] Central L. & M. Co. v. Center, 107 Cal. 193, 197, 40 Pac. Rep. 334. See **Kerr's Cyc. Code Civ. Proc.,** § 1197.

[31] See §§ 101, and §§ 112 et seq., ante.

§ 644. **Same. Actions by owner.** The owner has an action against the original contractor under a valid original contract, and against his own laborers and material-men,[32] for breach of the contract; but he has no action on the contract under a void contract.[33] But in such an action against the material-man, when the contract was to be performed within a certain time, it is not prematurely commenced when brought a few months after that time, if defendants were still working thereunder with plaintiff's consent, there being no waiver of the claim for damages.[34]

Damages. Where the cause of action for a breach of the contract for materials was complete when the suit was commenced, and plaintiff could not maintain another suit for the damages, it is proper to allow damages accruing after the commencement of the action; and the loss of profits is a natural and necessary consequence of a failure to furnish and remodel an ice plant, as agreed.[35] The owner has also an action on the contractor's bond, when such is given in connection with the original contract.[36]

§ 645. **Provisional remedies.**[37] **Statutory provision.** The statute[38] provides: "Except as otherwise provided in this chapter, the provisions of part two [relating to civil actions] are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter." The provisions of the Code of Civil Procedure relating to provisional remedies,[39] including injunction, attachment, and receivers, are found in part two of the Code of Civil Procedure.

[32] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637, 639.
Wyoming. Halleck v. Bresnahen, 3 Wyo. 73, 2 Pac. Rep. 537.
[33] See §§ 510 et seq., §§ 319 et seq., ante.
[34] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637, 639.
Action by owner to bring in all parties, and deposit of money in court: See Stimson v. Dunham, 146 Cal. 281, 283, 79 Pac. Rep. 968.
[35] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637, 639.
Repudiation of part of contract with architect by owner, optional with architect to treat entire contract as broken, or waive breach as to part not expressly repudiated and continue work: De Prosse v. Royal E. D. Co., 135 Cal. 408, 410, 67 Pac. Rep. 502.
[36] Kurtz v. Forquer, 94 Cal. 91, 29 Pac. Rep. 413.
See "Bond," §§ 281 et seq., ante; "Sureties," §§ 605 et seq., ante.
Wyoming. Halleck v. Bresnahen, 3 Wyo. 73, 2 Pac. Rep. 537.
[37] See "Waiver," §§ 627 et seq., ante.
[38] **Kerr's Cyc. Code Civ. Proc.,** § 1198.
[39] See **Kerr's Cyc. Code Civ. Proc.,** §§ 478-574, and notes.

§ 646. Same. Attachment. It is thought that a mechanic's lien, when perfected, is a "security" upon real property, under subdivision one of section five hundred and thirty-seven of the Code of Civil Procedure, relating to attachments in the case of residents;[40] and as the affidavit requires a statement, in the case of residents, that the "payment of the same has not been secured by any mortgage or lien upon real . . . property, . . . or if originally so secured, that such security has, without any act of plaintiff, or the person to whom the security was given, become valueless," it would seem that no attachment could issue, unless the security has become valueless, as stated; but that an attachment could issue in the case of a non-resident.[41]

Garnishment before suit. It has been shown that a proceeding in the nature of an attachment is allowed to subclaimants, before suit, to garnish funds due from the employee to the contractor.[42]

Garnishment after suit commenced. In an action by a subcontractor's material-man against the subcontractor, where the contractors, upon being served with a garnishment, deliver to the sheriff the money in their hands, which they owe the subcontractor, the material-man has no further claim upon them by virtue of the writ of attachment, and until he obtains a judgment against the subcontractor, he is not entitled to demand from the sheriff the moneys held under the garnishment.[43]

[40] See Hill v. Grigsby, 32 Cal. 55, 59.

See also **Kerr's Cyc. Code Civ. Proc.**, § 537, and note.

Attachment for damages claimed for breach of contract by delay in delivery of steel for building: See Hale Bros. v. Milliken, 142 Cal. 134, 75 Pac. Rep. 653.

Oregon. Ehrman v. Astoria & P. R. Co., 26 Oreg. 377, 38 Pac. Rep. 306.

[41] Under the act of 1856 an attachment was allowed in connection with the right to foreclose a mechanic's lien: Brennan v. Swasey, 16 Cal. 140, 142, 76 Am. Dec. 507. The lien, however, was not perfected by the filing of a claim of lien at the time of the commencement of the attachment suit, although perfected later, on the same day.

See "Rights of Material-men," § 101, ante.

[42] §§ 547 et seq., ante.

[43] Kruse v. Wilson, 3 Cal. App. 91, 84 Pac. Rep. 442.

As to garnishment of public moneys, see Simpson v. Gamache, 134 Cal. 216, 218, 66 Pac. Rep. 222.

§ 647. **Same. Materials exempt from attachment.** Materials furnished are exempt from attachment, execution, or other legal process, except in favor of the one furnishing the same, so long as, in good faith, they are about to be applied to the construction, alteration, or repair of the building, mining claim, or other improvement.[44]

§ 648. **Same. Injunction.** In an action to foreclose a lien, claimants are entitled to an injunction to restrain a judgment creditor of a lessee, whose judgment is younger than the lien, from removing a building from the lot, when the security is insufficient without such building; and an amended complaint, by leave of court, or a judge thereof, may be filed without prejudice to an injunction previously granted, and no new cause of action being introduced when thus filed, the injunction will not be dissolved by reason thereof.[45]

Fund not deposited in court. Where the fund in the hands of the owner was not actually brought into court by the owner, the court will not restrain lien claimants from filing their claims of lien and enforcing such liens in regular course for the preservation of their rights.[46]

[44] **Kerr's Cyc. Code Civ. Proc.,** § 1196.

Washington. It is immaterial whether it was to be so used by the owner, or the one succeeding to his rights; nor would the fact that litigation had been pending a number of years affect that question, or necessarily require a finding that there was no intention to use the materials in the completion of the building: Potvin v. Wickersham, 15 Wash. 646, 47 Pac. Rep. 25.

[45] Barber v. Reynolds, 33 Cal. 497, 503.

See "Forum," §§ 651 et seq., post.

Injunction refused where building had already been removed, although not beyond center line of street: See Stowell v. Waddingham, 100 Cal. 7, 34 Pac. Rep. 436; and compare, generally, Miller v. Waddingham, 91 Cal. 377, 27 Pac. Rep. 750, 13 L. R. A. 680; Buckout v. Swift, 27 Cal. 433, 87 Am. Dec. 90; Hill v. Gwin, 51 Cal. 47. Impairment of mortgage security: Lavenson v. Standard Soap Co., 80 Cal. 245, 22 Pac. Rep. 184, 13 Am. St. Rep. 147; Miller v. Waddingham, supra; Perrine v. Marsden, 34 Cal. 14.

Protection of mechanics' liens by enjoining sales under other process: See note 30 L. R. A. 128.

Arizona. Injunction to restrain sale of property: See Bogan v. Roy (Ariz., May 28, 1906), 86 Pac. Rep. 13, 15.

Washington. Enjoining levy of execution on materials: See Potvin v. Denny H. Co., 37 Wash. 323, 79 Pac. Rep. 940.

Injunction against sale of property on foreclosure of lien, wife not being made a party: See Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

[46] Stimson v. Dunham, 146 Cal. 281, 284, 79 Pac. Rep. 968.

CHAPTER XXXIII.

TIME, PLACE, AND MANNER OF COMMENCING ACTIONS TO FORECLOSE LIEN.

§ 649. Time of commencing actions to foreclose.
§ 650. Same. Action to foreclose lien upon the fund.
§ 651. Place of commencing action to foreclose. Generally.
§ 652. Same. Statutory provision.
§ 653. Same. Jurisdiction of superior court.
§ 654. Same. Amount less than jurisdictional limit.
§ 655. Same. Foreclosure of lien in Federal courts.
§ 656. Manner of commencing actions to foreclose.
§ 657. Same. Summons.
§ 658. Same. Lis pendens.

§ 649. Time of commencing actions to foreclose.[1] Suit to foreclose the lien must be commenced within the time

[1] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 62, 40 Pac. Rep. 45. See "Intervention," §§ 873 et seq., post; "Notice," §§ 547 et seq., ante.

Time of commencing action: See Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681 (credit given); but see Provident Mut. B. & L. Assoc. v. Shaffer, 2 Cal. App. 216, 83 Pac. Rep. 274.

As to running of statute of limitations against enforcement of mechanic's lien, see 7 Am. & Eng. Ann. Cas. 940, 947.

Limitations, action against school board by architect: See Todd v. Board of Education, 122 Cal. 106, 54 Pac. Rep. 527.

Time of commencing action. Threshing-machine: See Blackburn v. Bell, 125 Cal. 171, 57 Pac. Rep. 775.

Alaska. Action to foreclose within six months after filing lien: Jorgenson Co. v. Sheldon, 2 Alas. 607, 610.

Colorado. See Small v. Foley, 8 Colo. App. 435; Orman v. Crystal River R. Co., 5 Colo. App. 493, 39 Pac. Rep. 434.

Within six months after filing statement: Johnson v. Bennett, 6 Colo. App. 362, 40 Pac. Rep. 847.

Limitations, four months: Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83, 86.

Oklahoma. Time of commencing action: See Fulkerson v. Kilgore, 10 Okl. 655, 64 Pac. Rep. 5.

Oregon. Limitation: 2 Hill's Ann. Laws, p. 1906 (miners' liens), exception to 1 Hill's Ann. Laws, § 16: Burns v. White Swan M. Co., 35 Oreg. 305, 57 Pac. Rep. 637.

Utah. Action must be commenced within one year from filing statement (under Sess. Laws 1890, § 21): Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008.

Washington. Time to commence action: See Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397; Service v. McMahon, 42 Wash. 452, 85 Pac. Rep. 33.

limited by statute; otherwise the lien is lost.[2] Limitations relied upon, however, must be specifically pleaded.[3] The Code of Civil Procedure[4] provides: "No lien provided for

[2] Green v. Jackson W. Co., 10 Cal. 374 (1855); Flandreau v. White, 18 Cal. 639, 641; Van Winkle v. Stow, 23 Cal. 457, 458.

Under Practice Act, providing that a suit was commenced upon the filing of a complaint and the issuing of a summons thereon, it was held that an action to foreclose the lien, not commenced within the statutory time after the filing of the claim of lien with the recorder, could not be maintained: Green v. Jackson W. Co., supra. And when there is a general provision, as in the General Limitations Act of 1851, that the filing of the complaint should be deemed the commencement of the action, a provision of the General Practice Act, that the complaint must be filed and summons issued in order to constitute the commencement of the action, was held to govern: Flandreau v. White, supra.

Cross-complainant, as actor, must commence suit to foreclose within the statutory time: See Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

Colorado. Cornell v. Conine-Eaton L. Co., 9 Colo. App. 225, 47 Pac. Rep. 912; Orman v. Crystal River R. Co., 5 Colo. App. 493, 39 Pac. Rep. 434 (1893).

Oklahoma. The law exempts the owner of the property from suit for sixty days after the completion of the improvement; but it was held that if he defends the action, he waives the exemption: El Reno E. Co. v. Jennison, 5 Okl. 759, 50 Pac. Rep. 144.

Oregon. No process was served thereon, nor did they make service thereof on the owners of the property within six months after the filing of their respective claims: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454. But see Coggan v. Reeves, 3 Oreg. 275, where, under an early statute, the failure to bring the action within the statutory time precluded a defendant claimant from enforcing his lien after the statuory period (one year), by way of answer. See Willamette Falls Co. v. Perrin, 1 Oreg. 182 (1851; one year).

Washington. Gen. Stats., § 1670, provided that the action must be commenced within eight months after the claim had been filed, or if a credit was given, then within eight months from the expiration of such credit; and the following clause, "but no lien shall continue in force under this chapter for a longer time than two years from the time the work is completed by agreement or credit given," means that such credit cannot be extended for a longer time than two years and the lien maintained: Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. Rep. 273.

[3] Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74.

Court must determine issue as to limitations: Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74.

See note 7 Am. & Eng. Ann. Cas. 947.

Action against sureties on contractor's bond is governed by same limitation as action against contractor: Paige v. Carroll, 61 Cal. 211; Sonoma County v. Hall, 132 Cal. 589, 62 Pac. Rep. 257, 312, 65 Id. 12, 459; Towle v. Sweeney, 2 Cal. App. 29, 33, 83 Pac. Rep. 74. See Farmers' & M. Bank v. Kinsley, 2 Doug. (Mich.) 378, 403.

[4] **Kerr's Cyc. Code Civ. Proc.,** § 1190.

in this chapter binds any building, mining claim, improvement, or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by an agreement to give credit."

The general rule under this provision is, that recorded claims bind the building only ninety days after the date of record, unless in the mean time suits are commenced to foreclose them.[5]

An amendment to the complaint, based upon the same cause of action, relates back to the date upon which the original complaint was filed, and hence is commenced within ninety days after the claim of lien, if the original complaint is so filed.[6]

Debt must be payable. However, there can be no foreclosure of a mechanic's lien until the debt for which the lien is given as security has become payable. The complaint must show this fact, otherwise it will not support the judgment.[7]

[5] White v. Soto, 82 Cal. 654, 658, 23 Pac. Rep. 210; Goss v. Strelitz, 54 Cal. 640, 643 (dictum). See Roylance v. San Luis Hotel Co., 74 Cal. 273, 278, 20 Pac. Rep. 573.

[6] White v. Soto, 82 Cal. 654, 658, 23 Pac. Rep. 210.

See "Amendment," §§ 865. et seq., post.

See Jones v. Frost, 28 Cal. 245, 246; Barber v. Reynolds, 33 Cal. 497, 501; Easton v. O'Reilly, 63 Cal. 305, 308; McFadden v. Ellsworth M. & M. Co., 8 Nev. 57, 60; Louisville & N. R. Co. v. House, 104 Tenn. 110, 111, 56 S. W. Rep. 836.

[7] Harmon v. Ashmead, 60 Cal. 439, 441.

A right in the plaintiff and a correlative wrong in the defendant are essential to a right to maintain the action: Harmon v. Ashmead, supra. See Abbe v. Marr, 14 Cal. 210; Frisch v. Caler, 21 Cal. 71; Kinsey v. Wallace, 36 Cal. 463; Choynski v. Cohen, 39 Cal. 501, 2 Am. Rep. 476; Roberts v. Treadwell, 50 Cal. 520.

And where, as under the insolvency act of 1880, a debt secured by a mechanic's lien was not provable thereunder, and a suit to foreclose the lien was not stayed by any of its provisions, it was held that the action to foreclose must be commenced within the ninety days, notwithstanding the insolvency proceedings: Bradford v. Dorsey, 63 Cal. 122, 123. See §§ 11, 56, 57, and 67 of the "Act to Establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898 (1 Fed. Stats. Ann., pp. 685-688).

Credit given. Suit may be brought by an original contractor within ninety days after the expiration of a credit given.[8]

§ 650. **Same. Action to foreclose lien upon the fund.** Suits to foreclose the lien upon the "fund," or in personam against the owner, based on the notice to the owner under section eleven hundred and eighty-four,[9] are not required, under the section quoted in the preceding section, to be commenced within ninety days after the filing of a claim of lien.[10]

Nevada. An assignee in bankruptcy took the realty of the bankrupt charged with mechanics' liens theretofore arising for labor performed on the same, and thereafter to be enforced by the filing of an account, etc., as provided in the law: Sabin v. Connor, 21 Fed Cas., p. 124 (1871).

Oklahoma. See Stats. 1893 (4531). "Where a person has a lien on property securing several different demands, or demands due at separately stated intervals, it is not necessary that he should wait to bring his suit until all become due. He may bring an action to foreclose the lien upon any default. The court, of course, cannot render judgment for more than is due at the time the judgment is rendered. . . . But an instalment falling due before the trial, although not due when the suit was brought, may be included in the decree": El Reno E. L. & T. Co. v. Jennison, 5 Okl. 769, 50 Pac. Rep. 144.

Oregon. The lien law then in force was not opposed to the terms and policy of the bankruptcy act of 1867: In re Coulter, 2 Sawy. 42, 6 Fed. Cas., p. 637, 6 Nat. Bank. Reg. 64, 1 Am. L. T. Rep. Bank. 257, 3 Chic. Leg. News 377, 4 Am. L. T. 131.

Under 2 Hill's Ann. Laws, § 3675, it was held that when more than six months had elapsed after the expiration of credit on certain instalments, no recovery could be had on such instalments. The plaintiff "was not required to wait until the last instalment became due before bringing its suit, but could have brought it at any time within six months after the filing of the lien, and obtained a decree, as provided in § 421, which is made applicable to suits to foreclose mechanics' liens, by § 3677": Capital L. Co. v. Ryan, 34 Oreg. 73, 54 Pac. Rep. 1093.

Washington. Under the assignment statute, it was held that the lien could not be enforced against the property after it had passed into the hands of the assignee for the benefit of creditors, but all those having claims against the estate were required to present them in the insolvency proceeding: Quinby v. Slipper, 7 Wash. 475, 35 Pac. Rep. 116, 38 Am. St. Rep. 899.

[8] Knowles v. Baldwin, 125 Cal. 224, 226, 57 Pac. Rep. 988.

Time of commencing action accruing after the expiration of credit: Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

[9] **Kerr's Cyc. Code Civ. Proc., § 1184.**

[10] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45. See "Notice," §§ 547 et seq., ante.

§ 651. Place of commencing action to foreclose.[11] **Generally.** Under the California constitution of 1879,[12] the superior court has original jurisdiction of all cases in equity,[13] and, apparently, to enforce all liens upon real property; and it is also provided that all suits for the enforcement of liens upon real estate must be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. The provisions as to forum, found in part two of the Code of Civil Procedure, are applicable to proceedings to enforce mechanics' liens.[14]

§ 652. Same. Statutory provision. Section three hundred and ninety-two[15] provides: "Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided in this code: 1. For the recovery of real property, or of an estate or interest therein, or for the determination, in any form, of such right or interest. . . . 3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another the plaintiff may select either of the counties, and

[11] **Colorado.** Amount of each separate claim determined the jurisdiction of county court: Keystone M. Co. v. Gallagher, 5 Colo. 23 (1872).

Superior court of Denver has jurisdiction over the contract and person of non-resident owner contracting for building erected in Denver: Weiner v. Rumble, 11 Colo. 607, 19 Pac. Rep. 760.

Jurisdiction of supreme court, where none of the claims amount to $2,500: Spangler v. Green, 21 Colo. 505, 42 Pac. Rep. 674, 52 Am. St. Rep. 259 (constitutional question involved).

Washington. Under Ballinger's Ann. Codes and Stats., § 5910 (Laws 1893, § 11, p. 36), "no person can begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending" (Laws 1893, § 11, p. 36); but the language of this provision, "another lien," does not refer to an action to foreclose a mortgage then pending, but only to the "liens provided by this act": Nason v. Northwestern M. Co., 17 Wash. 142, 49 Pac. Rep. 235.

[12] Article vi, § 5.

[13] See **Kerr's Cyc. Code Civ. Proc.,** § 76, and note.

[14] **Kerr's Cyc. Code Civ. Proc.,** § 1198.

Utah. Action to be brought in county where mining claim situate: Fields v. Daisy G. M. Co., 26 Utah 373, 73 Pac. Rep. 521.

[15] See **Kerr's Cyc. Code Civ. Proc.,** § 392, and note.

the county so selected is the proper county for the trial of such action; provided, that in the case mentioned in this subdivision, if the plaintiff prays in his complaint for an injunction pending the action, or applies pending the action for an injunction, the proper county for the trial shall be the county in which the defendant resides or a majority of the defendants reside at the commencement of the action." [16]

§ 653. **Same. Jurisdiction of superior court.** The superior court has jurisdiction in equity, not only of a suit to foreclose a mechanic's lien on the real property of the owner, even where the amount claimed is less than three hundred dollars, but likewise of an action, under section eleven hundred and eighty-four, to subject funds owing to the contractor by such owner, which would necessitate an accounting and an apportionment among the several claimants of the fund, after the liability of the contractor had been fixed.[17]

§ 654. **Same. Amount less than jurisdictional limit.** In California and other code states, legal and equitable remedies may be pursued and granted by the same tribunal, and in a single action, and the fact that the equitable relief of foreclosure of the lien is not obtained in the superior court, by failure to establish the lien, furnishes no reason, in itself, for the refusal of the legal relief of judgment for the amount claimed, even if it be less than the jurisdictional amount of

[16] Under the act of 1850, county courts had no jurisdiction to enforce a mechanic's lien, where the amount in controversy exceeded two hundred dollars: Brock v. Bruce, 5 Cal. 279; but, under the act of 1861, county courts had jurisdiction to enforce mechanics' liens: McNeil v. Borland, 23 Cal. 144; Van Winkle v. Stow, 23 Cal. 457. In Davis v. Livingston, 29 Cal. 283, an action was commenced in the justice's court for $124, and the case was transferred to the district court for trial (under act of 1862, Stats. 1862, p. 385).

[17] Weldon v. Superior Court, 138 Cal. 427, 431, 71 Pac. Rep. 502.

See next note, post.

Place of foreclosing lien by trustee in bankruptcy, in state court: See In re Grissler, 136 Fed. Rep. 754, 69 C. C. A. 406.

Washington. Jurisdiction of court: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 718.

three hundred dollars, in the absence of an attempt to fraudulently confer jurisdiction on the court.[18]

§ 655. Same. Foreclosure of lien in Federal courts. Where the action to foreclose a mechanic's lien, created under the provisions of a state statute, is brought in the circuit court of the United States, the bill in equity must show the jurisdictional facts of citizenship, in order that the court may entertain the bill.[19]

§ 656. Manner of commencing actions to foreclose. An action to foreclose a mechanic's lien upon real property is commenced like civil actions, by the filing of a complaint.[20]

[18] Becker v. Superior Court (Cal. Sup., May 21, 1907), 90 Pac. Rep. 689, **overruling** Miller v. Carlisle, 127 Cal. 327, 59 Pac. Rep. 785; and see Williams v. Rowell, 145 Cal. 259, 261, 78 Pac. Rep. 725; Weldon v. Superior Court, 138 Cal. 427, 429, 71 Pac. Rep. 502.

Costs, in action to foreclose lien on threshing-machine, for less than jurisdictional amount: See Clark v. Brown, 141 Cal. 93, 95, 74 Pac. Rep. 548.

Action to cancel contract, amount less than three hundred dollars, jurisdiction of superior court: See Sullivan v. California R. Co., 142 Cal. 201, 206, 75 Pac. Rep. 767.

Colorado. Attorneys' fees not a part of debt, damage, or claim, limiting jurisdiction of county court: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 54.

[19] **Idaho.** Jurisdiction of Federal courts: See Holt v. Bergevin (Idaho), 60 Fed. Rep. 1.

Nevada. Hampton v. Truckee C. Co., 9 Sawy. 381, 19 Fed. Rep. 1, 1 West Coast Rep. 17.

[20] **Kerr's Cyc. Code Civ. Proc.,** §§ 405, 1198.

Under the act of 1861 (Stats. 1861, p. 495), the proceeding to foreclose a mechanic's lien was changed from an action to a special proceeding, and required the filing of a petition; and the clerk was required to issue a notice, which had to be published, but the act required no issuance of summons; and, under this, it was held that the suit was sufficiently commenced if the petition was filed and the notice issued by the clerk: Van Winkle v. Stow, 23 Cal. 457, 459.

Before the Practice Act, as it stood in 1857, a suit was not commenced until the summons was issued: Green v. Jackson W. Co., 10 Cal. 374.

See "Time of Commencing," §§ 649 et seq., ante.

Alaska. Procedure as on foreclosure of mortgage: Jorgenson v. Sheldon, 2 Alas. 607, 610.

Hawaii. Filing declaration is commencement of action: Hackfeld v. Hilo R. Co., 14 Hawn. 448, 457.

Three months' limitation: Pacific H. Co. v. Lincoln, 12 Hawn. 358.

Oregon. Action, when commenced: Burns v. White Swan M. Co., 35 Oreg. 305, 57 Pac. Rep. 637.

Utah. Publishing notice, inviting presentation of claims: See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360.

§ 657. **Same. Summons.**[21] Where the affidavit of service of summons on a corporation states that affiant personally

[21] Before the amendment of 1897 to § 407, Code Civ. Proc., omitting the requirement as to "the statement of the nature of the action in general terms," it was held that it was not necessary to state whether the right to the money sought to be recovered accrued from work and labor, or from goods sold and delivered, or to state the kind of lien sought to be foreclosed, or on what property such lien attached. The object of the requirement of the statute as to what the summons shall contain is carried out by a general statement of what is specialized in the complaint to which the summons points, expressly, or by implication of law; and it was held immaterial whether a copy of the complaint was served with the summons or not. (Before amendment of 1893 to § 410, requiring the service of a copy of the complaint with the summons): Bewick v. Muir, 83 Cal. 368, 369, 23 Pac. Rep. 390.

Appearance of infants: See § 668, post.

Service of summons: See Berentz v. Belmont O. Co., 148 Cal. 577, 580, 84 Pac. Rep. 47, 113 Am. St. Rep. 308.

Colorado. Under act of 1872, notice to other claimants to present claim; summons returned as in chancery proceedings: Decker v. Myles, 4 Colo. 558 (1872); Keystone M. Co. v. Gallagher, 5 Colo. 23 (1872; service by publication). In Davis v. Mouat L. Co., 2 Colo. App. 381, 31 Pac. Rep. 187 (1889), it was held that publication of summons would not support a judgment against a non-resident contractor, since the recovery of the debt from the contractor is the principal object of the suit, and the right to enforce the lien on the property against the owner is collateral and incident. See also Lomax v. Besley, 1 Colo. App. 21, 27 Pac. Rep. 167.

Publication of summons: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 55.

Issuance of alias summons in consolidated action, under 3 Mills's Ann. Codes and Stats., 1st ed., § 2867, not necessary: Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 55.

Montana. Service of summons: See Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 991.

Nevada. Service of summons: See Lonkey v. Keyes S. M. Co., 21 Nev. 312, 31 Pac. Rep. 57, 17 L. R. A. 351. Publication of notice to other lien-holders: Id.

New Mexico. Service of summons by publication against non-resident, valid, as far as proceeding in rem is concerned: Gunst v. Las Vegas M. B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

Oregon. Coggan v. Reeves, 3 Oreg. 275 (decided in 1871). See, as to contents of summons, Willamette Falls Co. v. Riley, 1 Oreg. 183.

Time of service on foreign corporations: See Burns v. White Swan M. Co., 35 Oreg. 305, 57 Pac. Rep. 637.

Sufficiency of publication of summons: Goodale v. Coffee, 24 Oreg. 346, 33 Pac. Rep. 990 (sufficiency of affidavit for publication).

Utah. Service of summons within one year of filing complaint, under Comp. Laws, §§ 3203, 3204, and service of summons on cross-complaint: See Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008.

Washington. Failure to serve husband, community property, time to commence action on lien having expired: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 721.

Service of summons on one spouse; community property: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 716.

Service of summons on cross-complaint unnecessary: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 717.

served the same upon E., "the managing agent" thereof, "by delivering to said E., the said managing agent of said defendant (corporation), personally, a copy of said summons attached to a true copy of the complaint, and that he knows the person so served to be the person acting as managing agent for said defendant (corporation)," it shows that the corporation was served, and is prima facie proof that E. was such managing agent, and the statute authorizes the service to be made upon him for the corporation.[22]

§ 658. Same. Lis pendens.[23] Contrary to the general rule, it has been held that a purchaser or encumbrancer of property upon which a claim of mechanic's lien is filed, and suit is brought to foreclose the same, is chargeable with notice thereof, by virtue of the mechanic's-lien statute, without the necessity of filing a lis pendens.[24]

[22] Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 629, 43 Pac. Rep. 14.

[23] Horn v. Jones, 28 Cal. 194, 203; Reeve v. Kennedy, 43 Cal. 643 (tax sale); and see **Kerr's Cyc. Code Civ. Proc.**, §§ 409, 1186, 1196, and notes.

See note 56 Am. St. Rep. 853-878, especially p. 856.

As to the necessity of filing a lis pendens, see "Priorities," §§ 486 et seq., ante.

[24] **Colorado.** Empire L. & C. Co. v. Engley, 18 Colo. 388, 33 Pac. Rep. 153.

See "Priorities," §§ 486 et seq., ante.

Nevada. See Lonkey v. Keyes S. M. Co., 21 Nev. 312, 31 Pac. Rep. 57, 17 L. R. A. 351.

Washington. See Frank v. Jenkins, 11 Wash. 611, 616, 40 Pac. Rep. 220.

See § 669, post.

CHAPTER XXXIV.

PARTIES.

§ 659. Parties plaintiff. Statutory provision.
§ 660. Same. Object of provision.
§ 661. Same. Raising objection.
§ 662. Parties defendant. Generally.
§ 663. Same. Owner.
§ 664. Same. Employers. Copartnerships.
§ 665. Same. Contractor.
§ 666. Same. Subcontractor.
§ 667. Same. Lien claimants.
§ 668. Same. Holders of prior interests and liens.
§ 669. Same. Interests pendente lite.

§ 659. Parties plaintiff.[1] Statutory provision. Section eleven hundred and ninety-five [2] provides: "Any number of persons claiming liens may join in the same action." [3] In construing this provision, the supreme court of California said: "Section eleven hundred and ninety-five of the Code of Civil Procedure, it will be observed, does not say whether the liens must be all upon the same property, or simply against the same person. We incline to the former construction." [4]

Several different liens, by different claimants, on the same property may be united in the same complaint.[5] Where the claims of lien-holders are several, separate, and distinct, without any community of interest in the claims themselves, and although there is no contract in writing, they

[1] **Partner as assignee of partnership.** Certificate of partnership: See Gray v. Wells, 118 Cal. 11, 17, 50 Pac. Rep. 23.

See "Assignees," §§ 588 et seq., ante; "Joinder of Causes of Action," §§ 723 et seq., post.

[2] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

[3] **Colorado.** Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402.

[4] Malone v. Big Flat G. M. Co., 76 Cal. 578, 582, 18 Pac. Rep. 772.

[5] Booth v. Pendola, 88 Cal. 36, 42; Malone v. Big Flat G. M. Co., supra. See Parker v. Savage P. M. Co., 61 Cal. 348; Curnow v. Happy Valley B. G. Co., 68 Cal. 262, 266, 9 Pac. Rep. 149.

See "Joinder of Causes of Action," §§ 723 et seq., post.

may, under such a provision, join as plaintiffs to foreclose their liens.[6]

Where a number of adjoining placer mining claims, owned by one company, are used and operated as one mine, they constitute one piece for the purposes of the mechanic's-lien law, and the claims upon different parts of the property may be joined in one action, but the counts should be separately stated.[7]

§ 660. **Same. Object of provision.** The purpose of the provision quoted in the last preceding section, allowing persons having liens upon the same property to join as plaintiffs, is to save expense, but more particularly to enable the court to determine the relative rights of lien-holders in the fund.[8]

§ 661. **Same. Raising objection.** A plea of non-joinder of necessary parties defendant in the action, if otherwise well taken, must prevail, irrespective of whether the plaintiff knew of the existence of the matter pleaded or not.[9]

Estoppel. Where an action is brought to foreclose a lien by one partner, whose copartner has given the owner a fraudulent release, the owner is prevented by estoppel from alleging that such copartner is a necessary party to the action.[10]

[6] Barber v. Reynolds, 33 Cal. 497, 502; Barber v. Reynolds, 44 Cal. 519, 532 (1862). See Easton v. O'Reilly, 63 Cal. 305; Gorton v. Ferdinando, 64 Cal. 11, 27 Pac. Rep. 941.

See "Joinder of Causes of Action," §§ 723 et seq., post.

[7] Malone v. Big Flat G. M. Co., 76 Cal. 578, 582, 18 Pac. Rep. 772. See Hamilton v. Delhi M. Co., 118 Cal. 148, 151, 50 Pac. Rep. 378.

[8] **Utah.** Purpose of law providing for combining of all parties upon the same property in one action is to save expense, and to enable the court to more definitely determine the respective rights of the several lien claimants as to distributing the fund accordingly; and substantial compliance with provisions of Rev. Stats. 1898, § 1391, is all that is required: Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605, 607.

[9] McDonald v. Backus, 45 Cal. 262, 264 (1868; partners).

Washington. But, if not raised below, cannot be raised on appeal: Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. Rep. 396.

Objection as to defect of parties, not to be raised on introduction of evidence: See Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144.

[10] South Fork C. Co. v. Gordon, 73 U. S. (6 Wall.) 561, bk. 18 L. ed. 894.

§ 662. Parties defendant.[11] Generally. The general rules with reference to the joinder of parties defendant apply in actions to foreclose mechanics' liens,[12] except where changed by statute. No attempt will be made to discuss the subject in detail, but reference will be more particularly

[11] Surety, absent from jurisdiction, not necessary party; action on bond: Tally v. Ganahl (Cal. Sup., June 19, 1907), 90 Pac. Rep. 1049.

See Tally v. Parsons, 131 Cal. 516, 63 Pac. Rep. 833.

Alaska. Proper parties: Jorgenson Co. v. Sheldon, 2 Alas. 607, 610.

Colorado. All persons interested should be made parties (Gen. Laws, § 1668): San Juan etc. Co. v. Finch, 6 Colo. 214; Snodgrass v. Holland, 6 Colo. 596; but only lien-holders and owner need be made parties: Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402. See San Juan Hardware Co. v. Carrothers, 7 Colo. App. 413, 43 Pac. Rep. 1053, **explaining** Johnston v. Bennett, 6 Colo. App. 362, 40 Pac. Rep. 847. But the grantee under a deed of trust given as security is not an "owner," within the meaning of Gen. Stats., § 2152, requiring him to be made a party: Cornell v. Conine-Eaton L. Co., 9 Colo. App. 225, 47 Pac. Rep. 912.

Unnecessary parties: See Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402; Fleming v. Prudential I. Co., 19 Colo. App. 126, 73 Pac. Rep. 752.

Hawaii. Parties defendant: See Allen v. Reist, 16 Hawn. 23, 24.

Montana. Those parties liable, necessary parties; otherwise judgment invalid: Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991; Gilliam v. Black, 16 Mont. 217, 40 Pac. Rep. 303; Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054, 1055.

Nevada. Same rules as on foreclosure of mortgage applicable: Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751.

New Mexico. See Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586. Minors as proper and necessary parties: Id.

Oklahoma. Contractor's sureties not necessary or proper parties to foreclosure: Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184, 186.

Oregon. Those personally liable, necessary parties: Lewis v. Beeman, 46 Oreg. 311, 80 Pac. Rep. 417.

Plaintiff suing on behalf of claimants in action on bond: See United States v. McCann, 40 Oreg. 13, 66 Pac. Rep. 274.

Washington. Assignees of claimant as party: See Fairhaven L. Co. v. Jordan, 5 Wash. 729, 735, 32 Pac. Rep. 729.

The person to whom the material was furnished and his wife, and the owner of the building and his wife, and the mortgagee, were proper parties defendant: Rasmusson v. Liming (Wash., Aug. 3, 1908), 96 Pac. Rep. 1044.

But where, in such an action between such parties, the plaintiff demanded a personal judgment against the contractor, which should be a community of obligation of himself and wife, and also asked that a lien on the property be decreed therefor and foreclosed, held that an account for goods sold and delivered against the contractor and his wife was not improperly joined with the cause of action against the owner and his wife and the mortgagee to establish a lien: Rasmusson v. Liming (Wash., Aug. 3, 1908), 96 Pac. Rep. 1044.

Suing surety alone: See Pacific P. Co. v. United States F. & G. Co., 33 Wash. 47, 73 Pac. Rep. 772.

[12] See **Kerr's Cyc. Code Civ. Proc.**, §§ 367 et seq., and notes.

directed to the persons whose rights are usually affected by the statute under discussion.

§ 663. **Same. Owner.** In an action by a subclaimant to foreclose a lien upon the property, it is proper to join the owner and the original contractor as parties defendant.[13] And it seems that the owner at the time of bringing the suit to foreclose the lien must be a party defendant;[14] but a mere agent is not a proper party.[15]

[13] Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 198, 20 Pac. Rep. 419.

Colorado. Davis v. Mouat L. Co., 2 Colo. App. 381, 31 Pac. Rep. 187.

Oregon. Osborn v. Logus, 28 Oreg. 302, 38 Pac. Rep. 190, 42 Pac. Rep. 997.

[14] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873 (dictum).

Receiver as party defendant: Pacific R. M. Co. v. Bear Valley Irr. Co., 120 Cal. 94, 95, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

Colorado. Decker v. Myles, 4 Colo. 558 (1872); Snodgrass v. Holland, 6 Colo. 596; German Nat. Bank v. Elwood, 16 Colo. 244, 27 Pac. Rep. 705.

Hawaii. Owner is necessary party: Hopper v. Lincoln, 12 Hawn. 352, 353. See Allen **v. Lincoln**, 12 Hawn. 356.

Nevada. Owner of legal title: Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751.

Oregon. Osborn v. Logus, 28 Oreg. 302, 310, 38 Pac. Rep. 190, 42 Pac. Rep. 997 (owner an indispensable party — dictum).

Washington. So the owners of a leasehold interest at the time of commencing the action should be made parties, but their assignors need not be, where no personal judgment is sought against them: Harrington v. Miller, 4 Wash. 808, 811, 31 Pac. Rep. 325.

In suit to foreclose lien upon community property, the wife is a necessary party: Littell Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. Rep. 1035, s. c. 8 Wash. 566, 36 Pac. Rep. 492, which states that the former decision held "that the suit for foreclosure of the lien could not be maintained against him (the husband), for the reason that he was not the sole owner of the property." See Turner v. Bellingham Bay L. & Mfg. Co., 9 Wash. 484, 37 Pac. Rep. 674; Sagmeister v. Foss, 4 Wash. 320, 30 Pac. Rep. 80, 744; Collins v. Snoke, 9 Wash. 571, 38 Pac. Rep. 161; Parsons v. Pearson, 9 Wash. 48, 36 Pac. Rep. 974. But see Douthitt v. MacCulsky, 11 Wash. 601, 606, 40 Pac. Rep. 186.

Wives of partners not necessary parties to an action to foreclose a lien upon the partnership real estate, such property being, in equity, a fund for the payment of the indebtedness of the partnership, they having no interest in the property which could be asserted in a court of equity against the rights of the creditors of the partnership, within the rule of Littell Mfg. Co. v. Miller, supra: Harrington v. Johnson, 10 Wash. 542, 39 Pac. Rep. 141.

Both spouses necessary parties, community property: Northwest B. Co. v. Tacoma S. Co., 36 Wash. 333, 78 Pac. Rep. 996; Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397; Powell **v.** Nolan, 27 Wash. 318, 67 Pac. Rep. 712.

[15] Hooper v. Flood, 54 Cal. 218, 220.

See "Demurrer," §§ 728 et seq., post.

Grantee of mortgager assuming the mortgage debt is a proper and necessary party to a foreclosure suit, where he agrees to pay for the work, and a personal judgment may be entered against the grantee for a deficiency.[16]

§ 664. **Same. Employers. Copartnerships.** All the members of a firm of employers should be made parties defendant, even where the name of the particular individual contracting with the claimant is alone set forth in the claim of lien which is filed in the recorder's office.[17]

Death of copartner. But where two tenants, as copartners, erect a building upon leased land, and one of the partners dies, and no judgment is sought against the estate of the deceased partner, the executor of the deceased is not a proper party, as the surviving partner only is authorized to defend for the partnership interest, especially where the deceased partner's interest has already been assigned before his death and the assignee is also a party to the action.[18]

§ 665. **Same. Contractor.** The contractor is a proper party in an action to foreclose a lien on the property of the owner;[19] but there seems to be some confusion in the

[16] San Francisco P. Co. v. Fairfield, 134 Cal. 220, 222, 226, 66 Pac. Rep. 255.

[17] McDonald v. Backus, 45 Cal. 262. See March v. McKoy, 56 Cal. 85, 87, where it was held that in an action to foreclose a mechanic's lien upon personal property the persons having a joint ownership are necessary parties.

Corporation sued as copartnership: See Rousseau v. Hall, 55 Cal. 164.

Nevada. See Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751.

[18] West Coast L. Co. v. Apfield, 86 Cal. 335, 341, 24 Pac. Rep. 993.

[19] Hooper v. Flood, 54 Cal. 218, 220; Holmes v. Richet, 56 Cal. 307, 311, 38 Am. Rep. 54; Yancy v. Morton, 94 Cal. 558, 560, 29 Pac. Rep. 1111; Wood v. Oakland & B. R. T. Co., 107 Cal. 500, 502, 40 Pac. Rep. 806. See Green v. Clifford, 94 Cal. 49, 52, 29 Pac. Rep. 331; McMenomy v. White, 115 Cal. 339, 343, 47 Pac. Rep. 109; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 643, 22 Pac. Rep. 860; Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 626, 16 Pac. Rep. 516.

In an action to foreclose a mechanic's lien, by a subcontractor, where the original contractors are partners, it is not necessary to make more than one of them a defendant; but if the owners of the property wish the other members of the firm to be made defendants, the court may, in its discretion, have them brought in, if they are within its jurisdiction: Barnes v. Colorado Springs & C. C. D. R. Co. (Colo.), 94 Pac. Rep. 570.

authorities as to whether he is a necessary party.[20] However, in any event, the contractor is not a necessary party to

[20] It has been held, in this connection, that the contractor is a necessary party to the full and complete determination of the matters in controversy; the court saying, "We have no doubt from the provisions of §§ 1193, 1194, and 1195, that it was the intent of the law-makers that, in an action to enforce a lien under this statute, all the persons claiming liens under the statute, including the contractor and owner, should be made parties, so that there might be a complete determination of all matters in controversy between the material-men and other lien-holders, the owner, and the contractor; and in this point of view the contractor is a necessary party; and if he was not made a party, the court should order him to be made a defendant, that there might be a full and complete determination of the matters in controversy": Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 200, 20 Pac. Rep. 419. See Griffith v. Happerberger, 86 Cal. 605, 612, 614, 25 Pac. Rep. 137, 487.

In Green v. Clifford, 94 Cal. 49, 52, 29 Pac. Rep. 331, it was said: "We do not know of any law which makes the contractor a necessary party, so far, at least, as the rights of the owner of the building are concerned; and the contrary was substantially decreed in Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 25 Pac. Rep. 747."

In Yancy v. Morton, 94 Cal. 558, 560, 29 Pac. Rep. 1111, it was said: "Appellant also complains that the contractors were not joined as co-defendants. While they were proper parties to the action, it does not appear that they were necessary parties, and if the defendant desired to have them joined as co-defendants, he should have made application to the court for such an order. In Russ Lumber Co. v. Garrettson, 87 Cal. 596, 25 Pac. Rep. 747, this court declared: 'Lastly, it is said that there is no judgment against the parties personally liable, and that such judgment is necessary to support the lien. We know of no law or decision supporting this position.' See also Green v. Clifford, 94 Cal. 49, 29 Pac. Rep. 331."

In the above cases, however, the earlier case of Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 20 Pac. Rep. 419, was not noticed; but in the subsequent case of Wood v. Oakland & B. R. T. Co., 107 Cal. 500, 502, 40 Pac. Rep. 806, in discussing this question, the court said: "The complaints proceed upon the theory and allege that the contract between the defendant corporation, the owner of the property, and the original contractor was void because neither the contract nor a sufficient memorandum thereof was filed with the county recorder, and the argument of appellant is, that, taking this allegation to be true, there is, in legal contemplation, neither a contract nor an original contractor, and the laborer or material-man has the right, under the statute, to sue the owner of the building directly to enforce his lien; that, in such instance, the contractor is not a necessary party to the determination of the matters involved in the action, and that making him a defendant is therefore improper. It is true that, under the facts alleged, Ecker (the contractor) was not a necessary party to the action, but it does not follow that he was not a proper party, and, if he was either the one or the other, the demurrer on that ground was correctly overruled. While plaintiffs could maintain their action against the owner alone to enforce their liens, the contractor with whom they dealt was alone personally liable to them for any deficiency that might arise; and, if a personal judgment against the contractor was for any reason desired, it was proper to make him a defendant. The practice has in fact been commended as tending to avoid a multiplicity of actions: Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 20 Pac. Rep. 419."

actions brought by the owner's claimants to foreclose liens, where the subject-matter thereof was furnished or done after the contractor abandoned the contract.[21]

§ 666. **Same. Subcontractor.** The subcontractor is a proper party in an action to foreclose a lien by a subclaimant with whom the subcontractor contracted, even where the statutory original contract is void.[22]

§ 667. **Same. Lien claimants.** All persons claiming liens are proper parties, and should be made parties defendant; for it is manifest that if each material-man or person performing labor on the building had to bring separate actions

Colorado. Contractor should be made party: Union Pac. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. Rep. 1095. Contractor is a necessary party: Union Pac. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. Rep. 1095; Charles v. Hallack L. Co., 22 Colo. 283, 43 Pac. Rep. 548; Estey v. Hallack L. Co., 4 Colo. App. 165, 34 Pac. Rep. 1113; Davis v. Mouat L. Co., 2 Colo. App. 381, 31 Pac. Rep. 187; Sayre-Newton L. Co. v. Park, 4 Colo. App. 482, 36 Pac. Rep. 445 (1889). See Hume v. Robinson, 23 Colo. 359, 362, 47 Pac. Rep. 271.

Montana. Contractor necessary party: Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054, 1055.

But where the contractor is not made a party, and no demurrer is filed therefor, the point cannot be raised for the first time on appeal: Duignan v. Montana Club, 16 Mont. 189, 40 Pac. Rep. 294. The person with whom claimant contracted is a necessary party: Gilliam v. Black, 16 Mont. 217, 40 Pac. Rep. 303.

Oregon. Contractor is not an indispensable party, but is a necessary or proper party: Osborn v. Logus, 28 Oreg. 302, 38 Pac. Rep. 190, 42 Pac. Rep. 997, where the subject is fully discussed under the Oregon statute, and a distinction between "indispensable" and "necessary" parties dwelt upon. But in Hand Mfg. Co. v. Marks, 36 Oreg. 523, 52 Pac. Rep. 512, and Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649, it was held that "he is not a necessary party to a suit to foreclose a mechanic's lien, unless a personal decree is sought against him by the owner."

Washington. See dissenting opinion, Tacoma L. & Mfg. Co. v. Wolff, 7 Wash. 478, 35 Pac. Rep. 115, 755 (the contractor may be a proper party, but not a necessary party, to the foreclosure suit). But see Maxon v. School Dist., 5 Wash. 142, 31 Pac. Rep. 462, 32 Pac. Rep. 110 (dissenting opinion).

[21] Green v. Clifford, 94 Cal. 49, 53, 29 Pac. Rep. 331.

Contractor made a party to foreclose lien: San Francisco P. Co. v. Fairfield, 134 Cal. 220, 226, 66 Pac. Rep. 255.

Oregon. Original contractor not necessary party to foreclosure, unless personal judgment is sought against him by owner: Cooper M. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649.

[22] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860.

for the recovery of his money, the expense of litigation would be greatly increased, and absorb the fund.[23]

§ 668. **Same. Holders of prior interests and liens.** As in the case of a suit to foreclose a mortgage, all persons interested in the premises prior to the commencement of the suit to enforce a mechanic's lien, whether purchasers,[24] heirs, devisees, remaindermen, reversioners, or encumbrancers, such as mortgagees,[25] must be made parties, otherwise their rights will not be affected.[26] And all persons acquiring

[23] Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 198, 200, 20 Pac. Rep. 419.

Colorado. Union Pac. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. Rep. 1095.

Other lien claimants necessary parties: Union Pac. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. Rep. 1095; San Juan H. Co. v. Carrothers, 7 Colo. App. 413, 43 Pac. Rep. 1053; Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402; Fleming v. Prudential I. Co., 19 Colo. App. 126. 73 Pac. Rep. 752.

Montana. See Mason v. Germaine, 1 Mont. 263, 268 (1865).

Nevada. Lonkey v. Wells, 16 Nev. 271, 277. See Elliott v. Ivers, 6 Nev. 287, 290.

Oregon. "All other lien-holders whose claims have been filed shall be made parties": Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

Lien-holders as parties: Goodale v. Coffee, 24 Oreg. 346, 356, 33 Pac. Rep. 990.

Washington. Setting out, in cross-complaint, facts showing claimant to be necessary party: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 717.

[24] See Montrose v. Conner, 8 Cal. 344, 347 (1855).

Colorado. Hart v. Mullen, 4 Colo. 512 (1872).

Montana. Purchaser, on foreclosure of mortgage, party: See McEwen v. Montana P. & P. Co. (Mont., June 3, 1907), 90 Pac. Rep. 359, 361.

[25] Walker v. Hauss-Hijo, 1 Cal. 183, 186 (1850).

See "Priority," §§ 486 et seq., ante; "Complaint," §§ 670 et seq., post.

Oregon. Persons holding liens by judgment or mortgage are not indispensable parties: Gaines v. Childers, 38 Oreg. 200, 63 Pac. Rep. 487.

[26] Whitney v. Higgins, 10 Cal. 547, 552, 70 Am. Dec. 748.

Parties to a judgment and their privies only are bound thereby: Whitney v. Higgins, supra. See Wakefield v. Van Dorn, 53 Neb. 23, 25, 73 N. W. Rep. 226.

See notes 77 Am. Dec. 658; 81 Am. Dec. 632; 82 Am. Dec. 658; 31 Am. St. Rep. 217; 36 Am. St. Rep. 574; 56 Am. St. Rep. 857.

See "Estoppel," §§ 816 et seq., post.

Colorado. Ford G. M. Co. v. Langford, 1 Colo. 62 (1864); Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519 (deed of trust); Branham v. Nye, 9 Colo. App. 19, 47 Pac. Rep. 402.

Nevada. Rosina v. Trowbridge, 20 Nev. 105, 17 Pac. Rep. 751 (cestuis que trustent proper but not necessary parties).

Oklahoma. Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303.

title,[27] or acquiring interests, as by mortgage,[28] or otherwise,[29] subsequently to the lien sought to be foreclosed, and prior to the commencement of the action, should be made parties to the action.[30]

Mortgagees made parties defendant to an action to enforce a lien have the opportunity to present whatever interests, as mortgagees, may be imperiled, and have whatever protection the law gives.[31]

Where infants are parties, they may appear by their general guardian, and the appearance of the general guardian is sufficient to give the court jurisdiction of the persons of the infants defendants.[32]

§ 669. **Same. Interests pendente lite.** It has already been seen that a lis pendens need not be filed upon the foreclosure of a mechanic's lien,[33] and it follows as a necessary corollary therefrom that persons who acquire interests by

Oregon. See Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Pac. Rep. 190, 42 Pac. Rep. 997 (2 Hill's Ann. Laws, § 3677, construed, and the subject fully discussed).

Washington. See Nason v. Northwestern M. Co., 17 Wash. 142, 49 Pac. Rep. 235; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186; Turner v. Bellingham Bay L. & Mfg. Co., 9 Wash. 484, 37 Pac. Rep. 674.

Lessees of part of the building should be made parties: Wright v. Cowie, 5 Wash. 341, 31 Pac. Rep. 878.

Objection for non-joinder waived, unless made by demurrer or answer: Harrington v. Miller, 4 Wash. 808, 810, 31 Pac. Rep. 325.

[27] Montrose v. Conner, 8 Cal. 344, 347 (1855).

[28] Gamble v. Voll, 15 Cal. 507, 510. See Gaines v. Childers, 38 Oreg. 200, 203, 63 Pac. Rep. 487.

[29] See Donohoe v. Trinity Consol. G. & S. M. Co., 113 Cal. 119, 121, 45 Pac. Rep. 259.

Colorado. Trustee and cestui que trust: Johnson v. Bennett, 6 Colo. App. 362, 40 Pac. Rep. 847; McClair v. Huddart, 6 Colo. App. 493, 41 Pac. Rep. 832.

Oregon. Subsequent lienor not necessary party, but may be compelled to redeem or be barred: Koerner v. Willamette I. W., 36 Oreg. 90, 58 Pac. Rep. 863, 78 Am. St. Rep. 759.

Lessee as party defendant: Lewis v. Beeman, 46 Oreg. 311, 80 Pac. Rep. 417.

[30] **Otherwise in case of mortgage;** decree held void: Watts v. Gallagher, 97 Cal. 47, 50, 31 Pac. Rep. 626; Brackett v. Banegas, 116 Cal. 278, 282, 48 Pac. Rep. 90, 58 Am. St. Rep. 180.

[31] Ah Louis v. Harwood, 140 Cal. 500, 505, 74 Pac. Rep. 41.

[32] Western L. Co. v. Phillips, 94 Cal. 54, 55, 29 Pac. Rep. 328.

New Mexico. Minors as parties, misjoinder: See Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726, 729.

[33] See § 658, ante.

conveyance or encumbrance after the commencement of the action need not be made parties to the action, as their interests will be bound by the judgment.[34]

[34] Whitney v. Higgins, 10 Cal. 547, 70 Am. Dec. 748. In Horn v. Jones, 28 Cal. 194, 204, it was held that persons having no interest in the property at the time the action was commenced, and who die pendente lite and after a lis pendens has been filed, need not be made parties. See Sharp v. Lumley, 34 Cal. 611, 615; Brady v. Burke, 90 Cal. 1, 27 Pac. Rep. 52. See § 658, ante.

Colorado. Cornell v. Conine-Eaton L. Co., 9 Colo. App. 225, 47 Pac. Rep. 912 (time for commencing suit having expired).

CHAPTER XXXV.

COMPLAINT.

§ 670. Complaint. In general.
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§ 724. Same. Designating causes of action separately.
§ 725. Same. Reference from one cause of action to another.
§ 726. Same. Actions that may be united in one complaint.
§ 727. Same. Objections, how raised.

§ 670. Complaint. In general.[1] In this portion of the work, treating of pleading and practice, the author will

[1] **Complaint for breach of contract** to construct specific improvements: See Bryant v. Broadwell, 140 Cal. 490, 494, 74 Pac. Rep. 33.

Action to foreclose mechanic's lien. Complaint. Substantial compliance with statute. The right to a mechanic's lien is purely a creature of the statute, and in order to sustain an action to foreclose such lien, it is essential that the complaint shall show a substantial compliance with the requirements thereof: Davis v. Treacy (Cal. App., 1908), 7 Cal. App. Dec. 5.

A complaint which fails to aver what the claim of lien filed in the office of the county recorder contained, other than a description of the property sought to be charged, does not set forth a cause of action: Davis v. Treacy, supra.

Averments of complaint by an architect, held insufficient to show a right of recovery of a percentage on the cost of a building, but sufficient to sustain damages recoverable for breach of contract: See Fitzhugh v. Mason, 2 Cal. App. 220, 225, 83 Pac. Rep. 282.

Complaint in action by a builder and architect: 6 Cyc. 51.

Complaint in an action to recover compensation due to builder: 6 Cyc. 92.

Failure of record to show service of amended complaint on default judgment: See Heinlen v. Erlanger (Cal., Jan. 29, 1884), 3 Pac. Rep. 129.

Filing of amended complaint without service of copy. Discretion is not abused by denying a motion to strike an amended complaint

confine himself to stating the rules that have been laid down by the courts under the statutes then in force, leaving the investigator to search in the preceding part of the book for the reasons governing such rules, and their present status.

The general principles of pleading are applicable to actions to foreclose mechanics' liens, except as otherwise provided in the chapter of the Code of Civil Procedure [2] on mechanics' liens.[3] But it is not intended here to enter upon the subject of pleadings in general,[4] and the title will be treated only so far as the rules are peculiar to or serve to illustrate the mechanic's-lien law.

§ 671. Stating cause of action. The facts necessary to constitute a cause of action, or to show the existence of the lien, whether upon the property or the fund, must, of course, be stated, in an action to foreclose a lien,[5] as in the case of all

from the files, on the ground that no copy thereof had been served upon the adverse party within time, where a copy is served before the filing of the motion: Klokke v. Raphael, 6 Cal. App. Dec. 508, 96 Pac. Rep. 392.

Alaska. Complaint: Jorgenson Co. v. Sheldon, 2 Alas. 607, 609.

Arizona. Action by architect, breach of contract, allegation of non-payment: See McPherson v. Hattich (Ariz., March 30, 1906), 85 Pac. Rep. 731.

Colorado. Pleading assignment: Hanna v. Savings Bank, 3 Colo. App. 28, 31 Pac. Rep. 1020.

See "Cumulative Remedies," § 638.

Idaho. Complaint for railroad construction: See Lewis v. Utah Const. Co., 10 Idaho 214, 77 Pac. Rep. 336.

Washington. Action by original contractor against surety of subcontractor; supplemental complaint: See Pacific B. Co. v. United States F. & G. Co., 33 Wash. 47, 73 Pac. Rep. 772.

[2] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1203a.

Estoppel by deed or matter of record must be pleaded as such, when there is an opportunity to plead it: Flandreau v. Downey, 23 Cal. 354.

See "Estoppel," §§ 816 et seq., post, and §§ 469 et seq., ante.

[3] **Kerr's Cyc. Code Civ. Proc.,** § 1198.

See Green v. Palmer, 15 Cal. 412, 76 Am. Dec. 492.

[4] See **Kerr's Cyc. Code Civ. Proc.,** §§ 420 et seq., and notes.

[5] O'Connor v. Dingley, 26 Cal. 11, 21; Weithoff v. Murray, 76 Cal. 508, 510, 18 Pac. Rep. 435; Corbett v. Chambers, 109 Cal. 178, 183, 41 Pac. Rep. 873. See Green v. Palmer, 15 Cal. 412, 415, 76 Am. Dec. 492; Jerome v. Stebbins, 14 Cal. 457, 459.

See "Demurrer," §§ 728 et seq., post.

Gist of action to foreclose mechanic's lien for money due upon the building contract is the breach of the contract; and unless there is an allegation of non-payment, the complaint is demurrable: Burke v. Dittus (Cal. App.), 96 Pac. Rep. 330.

Colorado. See Mouat L. Co. v. Freeman, 7 Colo. App. 152, 42 Pac. Rep. 1040 (facts necessary to creation of lien must be set forth, whether it appears in the statement or not). See San Juan H. Co. v.

other actions. The reader must bear constantly in mind that the allegations which may be necessary in an action by one of the persons, whose rights are herein treated, against another, may be entirely different from those required in an action between others. The preceding portions of this work should be consulted to determine what allegations, in any particular case, may be necessary.

As a general rule, the plaintiff must recover, if at all, upon the cause of action set out in the complaint, and not upon some other cause of action, nor upon essential facts which were omitted, and which may be developed by the proofs.[6] But a complaint which states a good cause of action for the recovery of money or for a personal judgment is not demurrable as not stating sufficient facts to constitute a cause of action, because there is an ineffectual effort to state in the complaint another cause of action for the foreclosure of a lien to secure the same money.[7]

Carrothers, 7 Colo. App. 413, 43 Pac. Rep. 1053; Arkansas River L. R. & C. Co. v. Flinn, 3 Colo. App. 381, 33 Pac. Rep. 1006. Leave to sue receiver: Colorado Fuel & I. Co. v. Rio Grande S. R. Co., 8 Colo. App. 493, 46 Pac. Rep. 845.

Montana. Statutory steps, under § 2131 of the Code of Civil Procedure, to be treated as jurisdictional: See McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428.

Nevada. Under act of 1875, no pleading by interveners was required: Hunter v. Truckee Lodge, 14 Nev. 24, 31. See Skyrme v. Occidental M. Co., 8 Nev. 219.

Oregon. Wilcox v. Keith, 3 Oreg. 372.

[6] Reed v. Norton, 99 Cal. 617, 619, 34 Pac. Rep. 333; Mondran v. Goux, 51 Cal. 151; Hicks v. Murray, 43 Cal. 515, 522.

But see § 700, post.

Lack of essential averment in complaint aided by answer in cross-complaint: See Donegan v. Houston (Cal. App., May 28, 1907), 90 Pac. Rep. 1073.

Complaint stating cause of action for personal judgment, where insufficient on foreclosure of lien, owing to unauthorized contract of executor: See San Francisco P. Co. v. Fairfield, 134 Cal. 220, 66 Pac. Rep. 255, 256.

Idaho. Sufficient allegation on foreclosure of laborer's lien: See Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218.

Washington. Complaint stating cause of action; irrigation-ditch; instalment payment from sale of bonds: See Dyer v. Middle Kittitas Irr. Dist., 25 Wash. 80, 64 Pac. Rep. 1009, 40 Wash. 238, 82 Pac. Rep. 301.

[7] Cox v. Western Pac. R. Co., 47 Cal. 87, 90.

Colorado. Complaint for labor performed for lessees of mining property, not stating cause of action for personal judgment, nor decree of foreclosure against owner: See Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843; Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612.

Washington. Complaint held good for enforcement of a lien or for general recovery: See Lee v. Kimball (Wash., March 12, 1907), 88 Pac. Rep. 1121 (well).

§ 672. **General rules of pleading contract.** "Under the system of pleading at common law, it was the general rule that a party to a special contract, who had performed his part of it, and nothing remained to be performed under the contract but the payment of the money, could maintain general assumpsit to recover the amount due him on the contract. It was also a general rule that while the special contract remains open and unrescinded, the party whose part of it is unperformed, in any respect, cannot sue in general assumpsit, but must sue in special assumpsit on the contract.

"**To the latter rule there were several exceptions**, and among them was the case where the special contract has been deviated from or modified by common consent and the service has been performed: the party claiming compensation for his services must sue in general assumpsit. The supreme court, in De Boom v. Priestly,[8] affirmed the doctrine of the exception just stated, and that case was followed by Reynolds v. Jourdan,[9] and Adams v. Pugh,[10] . . . [The plaintiff] can allege the execution of the contract, its terms, and subsequent modification or deviation made by agreement or consent of the parties, the performance of his part of the contract as altered or affected by the modifications or deviations, the non-performance by the other party of his part of the contract, and the damages thereby sustained by the plaintiff. All the cases hold that in an action brought in general assumpsit, in consequence of a deviation from the terms of the contract made by consent of the parties, the plaintiff may, and should, introduce in evidence the contract, and if it has not been wholly lost sight of in the services as performed, the rates and terms of compensation fixed in the contract will be the measure of damages, so far as the same can be traced in the performance. He must, of course, prove the performance of all his part of the contract, except so far as the same has been deviated from by consent. The contract, therefore, does constitute the basis of the action, and if there is any meaning in the rule that the evidence offered must correspond with the allegations, there can be no

[8] 1 Cal. 206.
[9] 6 Cal. 108.
[10] 7 Cal. 150.

question that, according to the rules of the Practice Act requiring the facts to be stated, the contract should be set forth in the complaint, together with the necessary allegations of deviations,[11] performance, etc., which the plaintiff must prove, instead of the general allegation that the defendant is indebted to the plaintiff for work and labor, etc.[12] . . . Mr. Chief Justice Bronson says:[13] 'When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired, but he can sue immediately for a breach of the special agreement.'"[14]

§ 673. **Same. Common counts.** In discussing the general rules laid down in the preceding section, the court has said: "The rules of pleading in regard to the employment of the common counts in actions on contracts are well stated by Professor Greenleaf, in the second volume of his work on Evidence,[15] as follows: 'The law on this subject may be reduced to three general rules:

"'**1. So long as the contract continues executory,** the plaintiff must declare specially; but when it has been executed on his part, and nothing remains but the payment of the price in money by the defendant, which is nothing more than the law would imply against him, the plaintiff may declare generally, using the common counts, or may declare specially on the original contract, at his election. If the mode of payment was any other than in money, the count must be on the original contract. And if it was to be in money, and a term of credit was allowed, the action, though

[11] Citing White v. Soto, 82 Cal. 654, 657, 23 Pac. Rep. 210; Daley v. Russ, 86 Cal. 114, 116, 24 Pac. Rep. 867. See Barilari v. Ferrea, 59 Cal. 1, 4.

[12] Citing Green v. Palmer, 15 Cal. 412, 76 Am. Dec. 492; Jerome v. Stebbins, 14 Cal. 457.

[13] Citing Hanna v. Mills, 21 Wend. 90.

[14] O'Connor v. Dingley, 26 Cal. 11, 20, 23. See Kalkmann v. Baylis, 17 Cal. 291.

Arizona. Pleading oral additions to written contract: See O'Connor v. Adams, 6 Ariz. 404, 59 Pac. Rep. 105.

Hawaii. Alleging express or implied contract: See Holmes v. Mello, 15 Hawn. 72, 75.

[15] § 104.

on the common counts, must not be brought until the term of credit has expired. This election to sue upon the common counts, where there is a special agreement, applies only to cases where the contract has been fully performed by the plaintiff.

"'2. **Where the contract, though partly performed,** has been either abandoned by mutual consent, or rescinded and extinct by some act on the part of the defendant. Here the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement. But, in order to do this, it is not enough to prove that the plaintiff was hindered by the defendant from performing the contract on his part; for we have just seen that in such case he must sue upon the agreement itself. It must appear from the circumstances that he was at liberty to treat it as at an end.

"'3. **Where it appears that what was done by the plaintiff was done under a special agreement,** but not in the stipulated time or manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by him. Here the plaintiff cannot recover upon the contract from which he has departed, yet he may recover upon the common counts for the reasonable value of the benefit which, upon the whole, the defendant has derived from what he has done.'" [16]

This last general rule or subdivision seems to be modified somewhat by the more recent decisions, which allow the plaintiff to sue in an action to foreclose the lien upon the express contract, where the imperfections are trifling, or there is a substantial performance of the express original contract.[17]

[16] Castagnino v. Balletta, 82 Cal. 250, 258, 23 Pac. Rep. 127.

[17] See "Performance," §§ 334 et seq., ante.

Colorado. See Charles v. Hallack L. Co., 22 Colo. 283, 43 Pac. Rep. 548; McGonigle v. Klein, 6 Colo. App. 306, 40 Pac. Rep. 465. But see Walling v. Warren, 2 Colo. 434.

Recovery on a quantum meruit in an action on one account for the total sum due: See Donegan v. Houston (Cal. App., May 28, 1907), 90 Pac. Rep. 1073.

Montana. Contractor abandoning work on a whole contract cannot recover on quantum meruit: See Riddell v. Peck-Williamson H. & V. Co., 27 Mont. 44, 69 Pac. Rep. 241.

§ 674. Same. Technical defects cured by acts of the parties. An action in indebitatus assumpsit lies to recover a balance for work and labor done and materials furnished, where the express special contract was substantially complied with by plaintiff, and where every technical failure of the plaintiff to comply with its strict letter was cured by the acts and consent of the parties.[18]

§ 675. Same. Express contract. If there is no special contract, none should be pleaded.[19] The express contract may be declared upon in hæc verba,[20] or in substance, and according to its legal effect. When the plaintiff in an action to foreclose a mechanic's lien alleges that a written contract was made between him and the defendant for the erection of a building upon which the lien is claimed, and that subsequently, by their oral agreement, it was modified, and sets forth clearly and with certainty what the contract as modified was, according to its legal effect, and alleges that it was executed on the part of plaintiff, the contract is not subject to defendant's demurrer on the ground of ambiguity, uncertainty, or unintelligibility.[21]

[18] Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487.

[19] Ehlers v. Wannack, 118 Cal. 310, 313, 50 Pac. Rep. 433.

[20] See Rauer v. Fay, 110 Cal. 361, 42 Pac. Rep. 902.

Washington. Defendant not misled; motion denied to set out contract in complaint; substance of contract set out: See Ekstrand v. Barth, 41 Wash. 321, 83 Pac. Rep. 305.

[21] White v. Soto, 82 Cal. 654, 657, 23 Pac. Rep. 210.

Where complaint alleged materials to have been furnished on the 1st of July, and the claim of lien stated that the materials were furnished "on or about" July 1st, the plaintiff will be limited to the allegations of the complaint, and he cannot recover for materials furnished before July 1st: Santa Monica L. & M. Co. v. Hege (Cal.), 48 Pac. Rep. 69; see, on rehearing, 119 Cal. 376, 51 Pac. Rep. 555.

As to whether or not it is necessary to allege date of contract, see California P. W. v. Blue Tent Cons. Co. (Cal., Oct. 8, 1889), 22 Pac. Rep. 391.

In case of an assignment, it is not necessary to allege that the assignment was in writing: Patent B. Co. v. Moore, 75 Cal. 205, 211, 16 Pac. Rep. 890.

As to whether or not it is necessary to allege that the statutory original contract was in writing, see Barber v. Reynolds, 33 Cal. 497, 502 (the original contract was void).

Montana. It is not necessary to allege the name of the contract, i. e., whether it was express or implied; when facts amounting to a contract are stated, the law names it: Nolan v. Lovelock, 1 Mont. 224.

§ 676. **Same. Conditions precedent.** Conditions precedent in the contract must be alleged to have been performed,[22] or an excuse alleged for non-performance. Thus when payments are due upon the performance of portions of the work, based upon estimates of the engineer, the plaintiff must allege the making of such estimates, or a legal excuse why they were not made.[23]

§ 677. **Same. Completion of building.** But it seems that it is not necessary, generally, for a subclaimant to allege the completion of the building, except as it may be necessary to show that the claim of lien was filed in time; for instance, within thirty days from the date of the completion of the structure.[24] An allegation in the complaint, as to the completion of a building, applies to all its parts, including excavations necessary to its construction, as contemplated by the contract.[25]

[22] So in an action by the owner against the contractor, where the contract provided that the contractor should pay all bills against the house, or litigate the same before paying them if he deemed them unjust, it is not sufficient to merely allege that the defendant failed to pay them; and where the contract provided that the defendant was to pay only such bills as the plaintiff had not made himself personally liable for, the complaint must allege that plaintiff had not made himself so liable: Fisher v. Pearson, 48 Cal. 473.

Arbitration as condition precedent. Where it is provided, in a contract for the construction of a building, that if any dispute shall arise, it shall be referred to arbitration, such reference is a condition precedent to the right to maintain an action: Burke v. Dittus, 6 Cal. App. Dec. 638, 96 Pac. Rep. 330.

As to averment of performance of conditions precedent, see **Kerr's Cyc. Civ. Code,** § 1439, note pars. 35-45.

Colorado. Allegation that plaintiff did all the work he was required to do by defendants, not an allegation of performance of work: See Griffin v. Seymour, 15 Colo. App. 487, 63 Pac. Rep. 809, 810.

Washington. An allegation that materials were received and used by defendant amounts to an allegation of defendant's satisfaction therewith, within the meaning of the contract: Childs L. & Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373.

[23] Cox v. McLaughlin, 63 Cal. 196, 207; Loup v. California Southern R. Co., 63 Cal. 97, 101.

See "Performance," §§ 334 et seq., ante; "Evidence," §§ 789 et seq., post.

[24] Wood v. Oakland & B. R. T. Co., 107 Cal. 500, 503, 40 Pac. Rep. 806.

Oregon. But the time when the building was commenced should be averred, so that it may be determined at what time the lien attached: Kendall v. McFarland, 4 Oreg. 293.

[25] Macomber v. Bigelow, 126 Cal. 9, 12, 58 Pac. Rep. 312.

§ 678. **Same. Certificate of architect.** It is not necessary that plaintiff should plead an excuse for not obtaining a final certificate of the architect, but he can show his right thereto, and that it was wrongfully withheld, under an averment of performance of the contract, especially where no objection was made at the trial to evidence of the inexcusable and arbitrary withholding of the certificate by the architect as not warranted by the pleadings.[26] Where the complaint states that the original contract was fully performed by the contractor, and contains a copy of the contract as an exhibit, and the contractor sues for the balance due thereon, and to establish a lien therefor, if the complaint contains no allegation that the work was done to the satisfaction of the architect, or that the architect gave a certificate, as required by the contract, and there is no special demurrer therefor, the objection will be held waived.[27]

§ 679. **Same. Prevention of performance.** But an allegation of non-payment is not an allegation of prevention of performance of the contract, in which the defendant agreed to pay certain instalments.[28] And where the plaintiff alleges that he was prevented from completing the contract by the defendants, it is good as against a general demurrer, if it does not show how or by what means the plaintiff was so prevented.[29]

[26] Wyman v. Hooker, 2 Cal. App. 36, 41, 83 Pac. Rep. 79.

Alleging excuse for not securing certificate as condition precedent: See Tally v. Parsons, 131 Cal. 516, 520, 63 Pac. Rep. 833.

Montana. The contractor's complaint to foreclose his lien must state that the certificate of the architect required by contract "was given or demanded, and if refused, the reasons why it should have been given, or if waived, a statement of that fact": See McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428.

Oregon. Excuse for failure to obtain certificate of architect should be averred, as a condition precedent to recover: Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126, 129.

[27] Wyman v. Hooker, 2 Cal. App. 36, 38, 83 Pac. Rep. 79.

Washington. Allegation of acceptance of work, held sufficient, as an allegation that work was performed to satisfaction of mine superintendent, as required by contract: See Lang v. Crescent C. Co. (Wash., Nov. 1, 1906), 87 Pac. Rep. 261.

[28] Cox v. McLaughlin, 54 Cal. 605, 610.

[29] Cox v. Western Pac. R. Co., 47 Cal. 87, 90.

§ 680. **Same. Debt due.** In an action to foreclose a lien on the property, it is necessary to allege, as in other cases, facts showing that the debt for which the lien is claimed has become payable; and so where the complaint alleges that the defendant promised to pay an agreed amount "upon the completion of the building," and also that at the commencement of the action the building was not completed, it is insufficient.[30] And it has been held that the amount due must be pleaded.[31] And this allegation of indebtedness must be made, notwithstanding the fact that the plaintiff alleges that while the contractor was performing the contract the owner compelled the contractor to abandon his work on the building, expelled him from it, refused to allow him to proceed with it, took possession of the building, completed it, used the materials purchased by the contractor in completing it, and has withheld from the contractor the balance of the contract price, stating it.[32]

§ 681. **Same. Non-payment of indebtedness to plaintiff.** And an allegation that the plaintiff performed services for which the lien was filed, and that the defendant has paid to plaintiff no part of the sum alleged to be due thereon, and the same is now due and owing to plaintiff from said defendant, is a sufficient allegation of non-payment, no demurrer being interposed.[33]

[30] Harmon v. Ashmead, 60 Cal. 439, 441.

[31] Doggett v. Bellows (Cal., March 24, 1885), 6 Pac. Rep. 421, 6 West Coast Rep. 57.

Wyoming. Sufficient allegation of balance due: See Davis v. Big Horn L. Co., 14 Wyo. 517, 85 Pac. Rep. 980.

[32] Turner v. Strenzel, 70 Cal. 28, 30, 11 Pac. Rep. 389. See Wiggins v. Bridge, 70 Cal. 437, 439, 11 Pac. Rep. 754.

See "Abandonment," §§ 358 et seq., ante; §§ 547 et seq., ante.

[33] Palmer v. Uncas M. Co., 70 Cal. 614, 615, 11 Pac. Rep. 666.

Issue of payment: Barry v. Coughlin, 90 Cal. 220, 27 Pac. Rep. 197.

Averment of non-payment essential. In an action to foreclose a mechanic's lien, the gist of the action is the breach of the contract, and unless there is an allegation of non-payment, the complaint fails to state a cause of action: Burke v. Dittus, 6 Cal. App. Dec. 638, 96 Pac. Rep. 330.

Where there is not an entire failure to state non-payment, but the same is averred in a defective manner, the complaint is sufficient, in the absence of a special demurrer particularly directed thereto: Burke v. Dittus, supra.

§ 682. **Same. Premature payment to contractor by owner.** Where a contractor's material-man avers in his complaint to foreclose a lien that there is now due to the contractor from the owner, under the contract, a certain sum, and that the same has not been paid, and does not deduct a premature payment made to the contractor, and ineffective, under section eleven hundred and eighty-four,[34] as against lien-holders, it alleges the ultimate fact; and the reasons why the sum alleged is due and has not been paid are not necessary to be stated, to raise an issue as to the premature character of the payment.[35]

§ 683. **Notice to owner.** A complaint to foreclose a lien, that alleges that plaintiff furnished materials, to be used in the construction of a building, stating in general terms the kind of materials, at the instance and request of the contractors, naming them, and that the amount agreed to be paid for all thereof was a certain sum, and that the plaintiff gave to the owner a written notice that he had agreed to furnish the materials, " as aforesaid," etc., shows what were the contents of the notice required by section eleven hundred and eighty-four, and is sufficient to meet the requirements of that section.[36]

Averment of construction and acceptance sufficient. Waiver. Where the complaint in an action to foreclose a mechanic's lien under a building contract, which provides that disputes shall be referred to arbitration, avers the performance of the work, the completion thereof, and the acceptance of the building, no averment as to such provision is essential, the complaint not disclosing any such disputes, and the acceptance of the building being a waiver of the right to reference if there were any: Burke v. Dittus, 6 Cal. App. Dec. 638, 96 Pac. Rep. 330.

[34] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[35] Ganahl v. Weir, 130 Cal. 237, 238, 62 Pac. Rep. 512.

Arizona. Alleging non-payment at time of filing complaint, instead of at time of filing statement: See McPherson v. Hattich (Ariz., March 30, 1906), 85 Pac. Rep. 731.

Alleging amount owing from owner to contractor in action by subclaimants, or premature payment: See Nason v. John, 1 Cal. App. 538, 540, 82 Pac. Rep. 566.

Oregon. Failure to allege amount due the contractor: See Watson v. Noonday M. Co., 37 Oreg. 287, 60 Pac. Rep. 994, 996.

[36] Russ L. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747.

See §§ 568 et seq., ante.

Utah. Subcontractors, in cases where the original contract is not of record, are not required to make positive averments in the plead-

§ 684. **Same. Indebtedness due contractor from owner at time of notice.** And in an action by subclaimants generally, under a valid original contract, in order to foreclose a lien upon the property the complaint must show that at the time of the filing of the claim of lien there was an indebtedness owing from the owner to the contractor,[37] or that at the time of service of notice on the owner, under section eleven hundred and eighty-four,[38] there were moneys due or to become due under the contract.[39]

Conclusion of law. Where neither the contract price, nor the reasonable value of the work, is set forth in the complaint, an averment that after the plaintiff gave the defendant written notice that he had agreed to furnish the materials there became due and owing from him to the contractor, on account of the contract, an amount in excess of the balance due and unpaid to the plaintiff, is a statement of conclusions of law, rather than of facts, and, of course, this statement, if tested by demurrer, would have been insufficient.[40]

ings of the amount of such contract, nor as to payments made under the original contracts: Morrison v. Inter-Mountain Salt Co., 14 Utah 201, 46 Pac. Rep. 1104 (1890), **modifying** Teahen v. Nelson, 6 Utah 363, 23 Pac. Rep. 764, under a prior statute, on these points.

Washington. It does not seem to be necessary to set out the amount due, nor in detail the terms or conditions of the contract between the owner and the contractor: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571.

[37] Renton v. Conley, 49 Cal. 185, 187; Wells v. Cahn, 51 Cal. 423, 424; Rosenkranz v. Wagner, 62 Cal. 151, 154; Whittier v. Hollister, 64 Cal. 283, 30 Pac. Rep. 846; Gibson v. Wheeler, 110 Cal. 243, 244, 42 Pac. Rep. 810. But see O'Donnell v. Kramer, 65 Cal. 353, 4 Pac. Rep. 204; Kellogg v. Howes, 81 Cal. 170, 175, 22 Pac. Rep. 509, 6 L. R. A. 588.

Under the logger's-lien act of March 30, 1878: Wilson v. Barnard, 67 Cal. 422, 423, 7 Pac. Rep. 845.

See "Liability of Owner," §§ 315 et seq., §§ 355 et seq., §§ 540 et seq., and §§ 452 et seq., ante; "Cumulative Remedies," §§ 638 et seq., ante.

Nevada. Contra, under act of 1875: Hunter v. Truckee Lodge, 14 Nev. 24, reviewing California cases, supra.

[38] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[39] See "Notice," §§ 547 et seq., ante, and references in previous note. Or it should state, according to Rosenkranz v. Wagner, 62 Cal. 151, that the owner was notified of or had knowledge of the claim of plaintiff prior to payment in full of the amount due to the original contractor under his contract.

Colorado. Jensen v. Brown, 2 Colo. 694; Epley v. Scherer, 5 Colo. 536 (Gen. Laws 1876, p. 595, § 1669); Ditto v. Jackson, 3 Colo. App. 281, 31 Pac. Rep. 81 (1889; that something was due at the time of furnishing materials).

[40] Russ L. Co. v. Garrettson, 87 Cal. 589, 592, 25 Pac. Rep. 747.

§ 685. **Same. Complaint by subcontractor's material-man.** A complaint by a subcontractor's material-man to foreclose the lien against the owner, which is in the usual form, and sets forth that at the time of the statutory notice, given to the owner by the plaintiff, a certain sum was yet unpaid to the original contractor, but contains no allegation that anything was due and unpaid from the original contractor to the subcontractor, states a cause of action, and a demurrer thereto is improperly sustained.[41]

§ 686. **Same. Notice to contractor. Action against fund.** As the notice provided by section eleven hundred and eighty-four of the Code of Civil Procedure is not required to be given to the original contractor, there is no necessity of averring such notice in an action by a subclaimant against the fund; nor any facts, as against the original contractor, which are peculiarly within the contractor's knowledge; nor of a claim by the contractor, which is presumably within the knowledge of the subclaimant.[42]

§ 687. **Request of owner. Subclaimant.** It has also been held that in such complaint of a subclaimant under a valid original contract it may be alleged that the work was done at the request of the owner, and that the owner agreed to pay plaintiff, the contract being with the original contractor.[43]

§ 688. **Contract alleged presumed to be non-statutory.** Where there is no allegation in the complaint of a contractor's material-man that the contract between the owner and the contractor was for an amount exceeding one thou-

[41] Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 2 Cal. App. 303, 304, 83 Pac. Rep. 292 (rehearing denied by supreme court; syllabus misleading). In this case plaintiff did not ask for a personal judgment against the contractor.

[42] Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 2 Cal. App. 303, 305, 83 Pac. Rep. 292.

[43] Parker v. Placer M. Co., 61 Cal. 348. The opinion is short, not very clear, and the law seems doubtful.

See "Variances," §§ 853 et seq., post.

sand dollars, it seems to be presumed that, therefore, the contract was not such a one as is required to be filed, but is a non-statutory original contract.[44]

§ 689. **Void contract.** Where the contract is not recorded, the overruling of a special demurrer to a complaint, which fails to allege that the original contract was in writing, or that it was for more than one thousand dollars, is harmless, these matters being peculiarly within the knowledge of the owner.[45]

Amount due. Where the contract is void, payment by the owner to the contractor is no defense to the complaint seeking to enforce a lien, and it is unnecessary to allege that anything was due the contractor when notice was served on the owner.[46]

Facts showing original contract to be void. It is not necessary to allege in the complaint of a subcontractor or subclaimant that the original contract is void, as that is a proper matter of evidence, especially on material facts alleged in the complaint.[47] But it had been held that in an action to enforce a lien on the property, subclaimants must show, by proper averments, either that the building was constructed under a valid contract, if statutory, or that it was

[44] Nason v. John, 1 Cal. App. 538, 541, 82 Pac. Rep. 566.
See "Non-statutory Contract," §§ 258 et **seq., ante.**

[45] Berentz v. Belmont O. Co., 148 Cal. 577, 584, 84 Pac. Rep. 47, 113 Am. St. Rep. 308.

Utah. As to complaint of subcontractor setting forth contract between original contractor and owner, see Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008. See Morrison **v.** Inter-Mountain S. Co., 14 Utah 201, 46 Pac. Rep. 1104; Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832.

[46] Berentz v. Belmont O. Co., 148 Cal. 577, 584, 84 Pac. Rep. 47, 113 Am. St. Rep. 308.

Judgment impressing fund due contractors. Owner without complaint. In an action to foreclose mechanics' liens, the owner cannot complain of the action of the court in impressing a fund deposited in court by the owner, and found due to the contractors, with any personal judgments rendered therein against such contractors in favor of subcontractors and material-men, whose liens have been declared void for the failure of the contractor to record the contract: Los Angeles P. B. Co. v. Higgins (Cal. App., 1908), 7 Cal. App. Dec. 95.

[47] Macomber v. Bigelow, 126 Cal. 9, 12, 58 Pac. Rep. 312; Yancy **v.** Morton, 94 Cal. 558, 29 Pac. Rep. 1111.

not; and a complaint upon one theory will not warrant a judgment rendered upon the other; and it was so held where the plaintiffs alleged facts going upon the theory that there was no contract, and that they dealt directly with the owner of the building, and that he was liable for the whole of their claim.[48]

§ 690. **Same. Agreed price. Value.** In an action by subclaimants under a void statutory original contract to foreclose a lien upon the property, it is necessary to make allegations as to the value of the labor done and materials furnished to the contractor, and it is not sufficient to allege merely what amounts the contractor agreed to pay therefor.[49]

But, in the absence of a demurrer for uncertainty, where the statutory original contract is void for want of record, and the complaint contains no direct averment of the value of the materials furnished by the material-man, but it was alleged that the claimant furnished them to the contractor at the agreed price stated, it is sufficient on appeal, although evidence of the fact, rather than the ultimate fact of value, since the agreed price was prima facie evidence of the value of the materials, and it must be held that the pleader in this manner alleged the value.[50]

§ 691. **Same. Request of owner.** Under a void statutory original contract, as well as when there is a substantial breach of section eleven hundred and eighty-four, as to payments, under a statutory original contract, subclaimants may sue for the value of the materials as furnished at the special instance and request of the owner of the building, and it was held that it was not necessary to set out the original contract

[48] Reed v. Norton, 99 Cal. 617, 619, 34 Pac. Rep. 333. But see Yancy v. Morton, 94 Cal. 558, 560, 29 Pac. Rep. 1111.
See "Variances," §§ 853 et seq., post.

[49] Booth v. Pendola, 88 Cal. 36, 41, 23 Pac. Rep. 200, 25 Id. 1101. See Booth v. Pendola (Cal., Aug. 1, 1890), 24 Pac. Rep. 714.
See "Evidence," §§ 798 et seq., and §§ 829 et seq., post.

[50] Bringham v. Knox, 127 Cal. 40, 44, 59 Pac. Rep. 198. See Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 25 Pac. Rep. 747.

and allege its invalidity. But there seems to be some conflict in reference to these points.[51]

§ 692. **Ownership.**[52] In all actions to foreclose a lien upon the property, the person sued as owner should be shown to be the owner at the time of commencing the action.[53] It will be observed that this involves an entirely different question from that concerning the person named as owner in the claim of lien;[54] and where the complaint avers that, in the claim of lien as filed, the plaintiff described the premises as those

[51] Yancy v. Morton, 94 Cal. 558, 560, 29 Pac. Rep. 1111.

In Reed v. Norton, 99 Cal. 617, 620, 34 Pac. Rep. 333, an action under a void original contract, it was said: "In an action to enforce the lien of a mechanic or material-man, the complaint must show, either that the building was constructed under a valid statutory contract, or that it was not; and a complaint upon one theory will not warrant a judgment rendered upon the other. In their complaints, respondents allege the facts, and go upon the theory that there was no contract, that they dealt directly with the owner of the building, and that he is liable for the whole of their claims. The court finds and proceeds upon the theory that these averments of respondents are not true, that there was a valid contract, and that respondents dealt directly with Helm as contractor, and not with Norton (the owner). The judgment must therefore be reversed. Upon the theory on which it was rendered, the complaint does not state facts sufficient to constitute a cause of action."

See "Variances," §§ 853 et seq., post.

In Coss v. MacDonough, 111 Cal. 662, 667, 44 Pac. Rep. 325, it was said: "It is insisted, the claim of lien having set up a contract between respondent Grubb and the original contractor Andrews, no recovery could be had upon a complaint setting out a conttract with defendant MacDonough, the owner. We think this contention unsound. That a complaint against the owner of the building may be filed under § 1184 [1183?] of the Code of Civil Procedure, upon a claim of lien setting up a contract with an alleged original contractor, is expressly held in Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 22 Pac. Rep. 860, and the principle is also fully supported in Yancy v. Morton, 94 Cal. 558, 29 Pac. Rep. 1111."

[52] **Colorado.** As to alleging ownership, see Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 121, 60 Pac. Rep. 179, 183.

Idaho. Allegation that labor was performed for owners, without showing who they were: Lowe v. Turner, 1 Idaho 109.

Joint owners: See Id.

[53] Corbett v. Chambers, 109 Cal. 178, 184, 41 Pac. Rep. 873. See Santa Barbara v. Huse, 51 Cal. 217, 219.

Oregon. Alleging ownership at time of work: See Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

Wyoming. See Fein v. Davis, 21 Wyo. 118.

Failure to allege that name of owner was unknown: See Wyman v. Quayle, 9 Wyo. 326, 63 Pac. Rep. 988.

[54] See "Claim of Lien," §§ 361 et seq., ante. See Hicks v. Murray, 43 Cal. 515, 521.

purchased and occupied by a certain person, there is no allegation that such person owned the property, or that any particular person owned the property at the time of the commencement of the action.[55]

Conveyance. As against a general demurrer, there being no special demurrer, an allegation that a deed to the property was delivered to a party is sufficient to show ownership in such party.[56]

§ 693. **Knowledge of improvement by owner.** The owner's knowledge, in some form, of the work should be alleged, to charge his interest.[57] Where, in an action to foreclose a lien, it is averred that the building was constructed upon the land "with the knowledge of each of said defendants," and the owner is a defendant, the complaint alleges that such owner had notice of the construction of the building.[58]

§ 694. **Notice of non-responsibility.** The complaint, however, need not aver that the owner of the realty did not give notice that he would not be responsible for the construction of the building, in order to bind his interest in the property

[55] Hicks v. Murray, 43 Cal. 515, 521.

Where the complaint alleges generally that the constructor of the building was the contractor, and further alleges specific facts showing that the constructor was the owner, the former allegation may be disregarded on general demurrer: Hinckley v. Field's B. & C. Co., 91 Cal. 136, 141, 27 Pac. Rep. 594.

[56] Bryant v. Broadwell, 140 Cal. 490, 494, 74 Pac. Rep. 33.

[57] Gibson v. Wheeler, 110 Cal. 243, 244, 42 Pac. Rep. 810.

Washington. So it is sufficient, under Laws 1893, p. 32, to aver that the purchaser of the material was "the contractor," who is made the agent of the owner thereunder: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571. See Kremer v. Walton, 11 Wash. 120, 39 Pac. Rep. 374, 16 Wash. 139, 47 Pac. Rep. 238.

Contra: Pacific R. M. Co. v. Hamilton, 61 Fed. Rep. 476 (under 1 Hill's Code, § 1663).

Hawaii. Contractual relation between owner and material-man must be pleaded; a mere allegation that materials were used in the building is insufficient: Allen v. Reist, 16 Hawn. 23.

Oklahoma. Unnecessary for subclaimant to aver or prove that owner had knowledge that the claimant furnished materials to contractor or was in privity with him: See Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

[58] West Coast L. Co. v. Newkirk, 80 Cal. 275, 277, 22 Pac. Rep. 231. Or where it alleges that the person who caused the work to be done was the "agent" of the owner: Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

on the foreclosure of a mechanic's lien thereon; such notice, if given, being matter of defense.[59]

§ 695. **Agency. Authority of person causing improvement to be made.** Whether the original contract is valid[60] or void,[61] the complaint in an action by a subclaimant to foreclose the lien upon the property should show that the person with whom he dealt had authority from the owner, either express or implied, to create liens upon the property.[62]

Employment by corporation. Allegation of employment by a corporation should be alleged by the corporation directly, and not "through" an agent, although the latter allegation is sufficient.[63]

§ 696. **Same. Mining claim.** Where an action is brought to foreclose the lien of a miner, under section eleven hundred and eighty-three,[64] as it stood before the amendment of 1893, for labor performed at the request of one alleged to be the agent of the owner, the plaintiff must allege and prove that the work was done at the request of such an agent of the owner as comes within the meaning of the section referred to.[65]

[59] West Coast L. Co. v. Newkirk, 80 Cal. 275, 277, 22 Pac. Rep. 231; Harlan v. Stufflebeem, 87 Cal. 508, 513, 25 Pac. Rep. 686.

See "Answer," §§ 738 et seq., post.

[60] Corbett v. Chambers, 109 Cal. 178, 183, 41 Pac. Rep. 873.

Colorado. Alleging agency: See Colorado I. W. v. Taylor, 12 Colo. App. 451, 55 Pac. Rep. 942.

Failure to plead facts to bind husband's interest: See Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. Rep. 350, s. c. 86 Pac. Rep. 1045.

Complaint failing to show privity between owner and lessee insufficient: Little Valeria G. M. & M. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. Rep. 970; Wilkins v. Abell, 26 Colo. 462, 58 Pac. Rep. 612.

[61] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 646, 22 Pac. Rep. 860.

[62] See "Agency," §§ 459 et seq., and § 572 et seq., ante.

Oregon. The complaint should show that the contract was made with the owner of the building or his agent: Wilcox v. Keith, 3 Oreg. 372 (decided in 1871).

Washington. See Pacific R. M. Co. v. Hamilton, 61 Fed. Rep. 476 (Cir. Ct.).

[63] Sullivan v. Grass Valley Q. M. & M. Co., 77 Cal. 418, 421, 19 Pac. Rep. 757.

[64] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[65] Reese v. Bald Mountain Consol. G. M. Co., 133 Cal. 285, 287, 65 Pac. Rep. 578.

The name of a defendant oil company set forth in the complaint does not compel the conclusion that a "well" alleged to have been constructed for it was a well for mining oil.[66]

§ 697. Same. Contractor as agent of owner. Where the complaint alleges that A. T. is the agent and contractor for the owner, that W. entered into a contract with the plaintiffs, by which said plaintiffs agreed to furnish materials, etc., and there is no allegation anywhere that W. agreed to pay for this material under any such contract, and it is quite apparent upon the face of the statement itself, and even more apparent from the construction of the pleading as a whole, that such allegation is not, and was not intended by the pleader as, an obligation that the contractor bought this material acting as the agent of the owner, W., it is evident that the statement is made in the sense of the term "agent" as used in section eleven hundred and eighty-three,[67] and not a common-law agent.[68] And, under similar circumstances, this is the rule, even where it is alleged that the claimant sold certain lumber, etc., to the owner, at the contractor's request, as the agent of the owner.[69]

§ 698. Same. Allegations to bind contractor. But where it was alleged that I. was the owner of the premises, and "that the defendant F. was employed by said defendant I.,

[66] Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 492, 82 Pac. Rep. 51.

[67] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[68] Jewell v. McKay, 82 Cal. 144, 146, 23 Pac. Rep. 139. See Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

See §§ 459 et seq., and §§ 469 et seq., ante.

Oregon. Hunter v. Cordon, 32 Oreg. 443, 52 Pac. Rep. 182; Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305. See Cross v. Tscharnig, 27 Oreg. 49, 39 Pac. Rep. 540; Allen v. Rowe, 19 Oreg. 188, 23 Pac. Rep. 901; Sellwood L. & M. Co. v. Monnell, 26 Oreg. 267, 38 Pac. Rep. 66. The complaint was required to show that the owner of the land erected the building, to bind the land: Willamette Falls Co. v. Riley, 1 Oreg. 183.

Washington. Cutter v. Striegel, 4 Wash. 346, 30 Pac. Rep. 326.

[69] Renton v. Conley, 49 Cal. 185, 187 (under act of March 30, 1868, § 1, similar to **Kerr's Cyc. Code Civ. Proc.,** § 1183, in this regard). See Reed v. Norton, 90 Cal. 590, 598, 26 Pac. Rep. 767, 27 Pac. Rep. 426 (void contract).

the owner as aforesaid, as agent for and in said construction and erection of said buildings," and that the claimant entered into an agreement with said defendant F., " as such agent of said defendant I., for the delivery of the materials," it was held that no cause of action was stated against the agent, where there is no allegation that the defendant agent was a " contractor " ; the court saying, " If it were alleged that F. was a contractor, subcontractor, architect, builder, or other person who had charge of the construction of the defendant Irvine's buildings, we should be bound to hold Flood to be the agent of Irvine for the purpose of chapter two, title four, of the Code of Civil Procedure." [70]

§ 699. **Materials.**[71] The plaintiff in an action to foreclose a lien upon the property for materials must allege and prove that they were furnished to be used,[72] and were actu-

[70] Hooper v. Flood, 54 Cal. 218, 220. And see Eaton v. Rocca, 75 Cal. 93, 95, 16 Pac. Rep. 529.

Void contract. Loss of liens. Personal liability of contractor. Judgment for, in foreclosure action. A lien claimant whose lien has been declared invalid for failure of the contractor to record the building contract may, in the action brought to foreclose the lien, obtain a personal judgment against the contractor to whom he furnished materials or rendered service: Los Angeles P. B. Co. v. Higgins (Cal. App., 1908), 7 Cal. App. Dec. 95.

[71] **Washington.** "Lumber": See Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099.

Alleging character of materials. It is no objection, however, to the complaint, that it fails to allege that the materials were such as were lienable articles, or of the kind or character to be used in the construction of the building in controversy. When it states the facts and alleges the kind of materials furnished, the law will determine whether or not the materials so furnished were lienable articles: " The term 'lumber' is certainly specific enough to furnish the owner with definite information": Bolster v. Stocks, 13 Wash. 460, 467, 43 Pac. Rep. 532, 534, 1099.

[72] Bottomly v. Rector of Grace Church, 2 Cal. 90, 92; Houghton v. Blake, 5 Cal. 240, 241; Holmes v. Richet, 56 Cal. 307, 311, 38 Am. Rep. 54; Patent B. Co. v. Moore, 75 Cal. 205, 210, 16 Pac. Rep. 890; Cohn v. Wright, 89 Cal. 86, 88, 26 Pac. Rep. 643; Neihaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255.

Not sufficient to show use in such building, etc.: Bottomly v. Rector of Grace Church, 2 Cal. 90.

Washington. As to allegation that materials were furnished " pursuant to or in performance of " the contract between contractor and owner, see Griffith v. Maxwell, 20 Wash 403, 55 Pac. Rep. 571.

Allegation and proof that materials were furnished for joint improvement of two or more mining claims: Sly v. Palo Alto G. M. Co., 28 Wash. 485, 68 Pac. Rep. 871.

ally used, in the building sought to be charged with the lien.[73]

Materials affixed and attached. Where the complaint alleges that the plaintiff sold and delivered to a certain person named as owner "certain hardware and building material to be used in the erection and construction of said building and affixed and attached thereto," it is sufficient to show that the materials were actually used in the building, at least if no special demurrer is interposed.[74]

Reference to claim of lien as exhibit. But an allegation "that the materials were furnished upon the terms and conditions set forth in plaintiff's notice of lien hereto attached, marked 'Exhibit A,' which is hereby referred to and made part hereof," while it may be said to be a sufficient averment of the terms and conditions of the contract, yet it is not a sufficient averment that the materials were furnished to be used in the construction of the building, since the plaintiff refers to the exhibit **and makes** it a part of the pleadings simply for the purpose of showing the terms and conditions of the sale to defendants, namely, the price of the materials and when payable.[75]

§ 700. **Same. Defect in complaint waived.** It has been held that, upon foreclosure of a lien, a failure to make the necessary allegation that the materials were actually used in the building may be waived by the conduct of the parties, as where the demurrer to the complaint was overruled by consent, and upon the trial, when plaintiff offered his evidence, counsel for defendant, in his statement to the court,

[73] Bottomly v. Rector of Grace Church, 2 Cal. 90, 92; Houghton v. Blake, 5 Cal. 240; Holmes v. Richet, 56 Cal. 307, 310, 38 Am. Rep. 54. See Davis v. Livingston, 23 Cal. 283, 288; Patent B. Co. v. Moore, 75 Cal. 205, 211, 16 Pac. Rep. 890; Cohn v. Wright, 89 Cal. 86, 88, 26 Pac. Rep. 643; Roebling Sons Co. v. Bear V. Irr. Co., 99 Cal. 488, 490, 34 Pac. Rep. 80; Hill v. Bowers, 45 Kan. 592, 593, 26 Pac. Rep. 13.

Colorado. Contra: Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64 (1889).

Oklahoma. Use of materials must be alleged: Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

[74] Reed v. Norton, 90 Cal. 590, 598, 26 Pac. Rep. 767, 27 Id. 426.

[75] Cohn v. Wright, 89 Cal. 86, 89, 26 Pac. Rep. 643 (on special demurrer).

limited his objection to the sufficiency of the form of the claim of lien, and gave the plaintiff the assurance that evidence of use might be given without another amendment to the complaint; and to permit the defendant to raise any objection to the complaint which might have been obviated by such a timely amendment would be unfair.[76]

§ 701. **Same. Materials furnished. Dates.** Where the complaint alleges that plaintiff furnished materials between April 6, 1862, and June 28, 1862, the fair and reasonable construction of the averment is that the plaintiff commenced furnishing the materials for the building on April 6th and continued to furnish the same from that time to June 28th.[77]

Furnished "on or about." But where the complaint alleged that the materials were furnished on the 1st of July, and the claim of lien stated that they were furnished "on or about" July 1st, the plaintiff will be limited to the allegations of the complaint, and he cannot recover for materials furnished before July 1st.[78]

§ 702. **Employment. Death of owner.** Under section nineteen hundred and ninety-eight,[79] providing for the continuance of the employment for a reasonable time after the death or insanity of the employer, the facts, and not mere conclusions, must be alleged in the complaint, and a mere

[76] Mandary v. Smartt, 1 Cal. App. 498, 500, 82 Pac. Rep. 561.

Montana. See Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 991.

[77] McCrea v. Craig, 23 Cal. 522, 525.

Oregon. The complaint should show the dates on which the materials were furnished: Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67; Willamette Falls Co. v. Smith, 1 Oreg. 171 (1851); or labor performed: Willamette Falls Co. v. Smith, supra.

[78] Santa Monica L. & M. Co. v. Hege (Cal., March 10, 1897), 48 Pac. Rep. 69, **following** Goss v. Strelitz, 54 Cal. 640; but see, on rehearing, 119 Cal. 376, 51 Pac. Rep. 555. See Reed v. Norton, 99 Cal. 617, 619, 34 Pac. Rep. 333; Fernandez v. Burleson, 110 Cal. 164, 167, 42 Pac. Rep. 566, 52 Am. St. Rep. 75; Madera F. & T. Co. v. Kendall, 120 Cal. 182, 52 Pac. Rep. 304, 65 Am. St. Rep. 177; Bell v. Bosche, 41 Neb. 853, 855, 60 N. W. Rep. 92; Lonkey v. Wells, 16 Nev. 274; Lavin v. Bradley, 1 N. M. 297; Morrison v. Willard, 17 Utah 306, 309, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

Distinguished: Henderson L. Co. v. Gottschalk, 81 Cal. 641.

[79] **Kerr's Cyc. Civ. Code,** § 1998.

allegation that the continuance of the employment was necessary, or that the time was reasonable, is not enough; the facts must be stated, showing it to be so.[80]

§ 703. **Nature of labor.** Where the allegation of the complaint is that the plaintiff performed labor in the erection of the building, and the evidence showed that the work consisted in tearing down an old building, and the work of the plaintiff might properly be said to be the erection of the building, the allegation is sufficient.[81]

Extra work for which a lien is claimed should be specifically set forth.[82]

§ 704. **Same. Grading and other work.** To state a cause of action under section eleven hundred and ninety-one of the Code of Civil Procedure, it must appear that the work was done "in an incorporated city or town," and if it is uncertain whether the work was done within an incor-

[80] Weithoff v. Murray, 76 Cal. 508, 510, 18 Pac. Rep. 435.

See §§ 117 et seq., ante.

Under the act of March 31, 1891 (Stats. and Amdts. 1891, p. 195), giving a lien to laborers on the property of corporations doing business in this state, the complaint was required to contain an allegation concerning the times at which the wages were payable, and that the plaintiff was employed at weekly or monthly wages: Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 631, 43 Pac. Rep. 14; Ackley v. Black Hawk G. M. Co., 112 Cal. 42, 45, 44 Pac. Rep. 330; Kuschel v. Hunter (Cal., Sept. 14, 1897), 50 Pac. Rep. 397.

Where the plaintiff alleged that he agreed to do the work by the month at an agreed rate of one hundred dollars per month, this is not an allegation that the company agreed to pay him monthly: Kuschel v. Hunter, supra. But, as shown elsewhere, this act was declared to be unconstitutional: See §§ 35 et seq., ante.

[81] Ward v. Crane, 118 Cal. 676, 678, 50 Pac. Rep. 839. It has been held that it is not necessary for the owner's laborer or material-man to state the nature of the alterations or repairs made, or whether each person performed a separate job, or contributed to a separate alteration or repair, or whether all contributed to the same thing: Jewell v. McKay, 82 Cal. 144, 146, 23 Pac. Rep. 139.

[82] Sweeney v. Meyer, 124 Cal. 512, 57 Pac. Rep. 479.

Colorado. The nature of the work, showing that it is within the statute, must be pleaded: Lindemann v. Belden Consol. M. & M. Co., 16 Colo. App. 342, 65 Pac. Rep. 403.

Under the act of 1864, it was held that the pleading should show whether the claimant labored as carpenter, mason, or otherwise, in order that it might be seen whether he was entitled to a lien: Ford Mining Co. v. Langford, 1 Colo. 62, 65. Same principle: Arkansas R. L. R. & C. Co. v. Flinn, 3 Colo. App. 381, 33 Pac. Rep. 1006 (1889).

porated city or town, or whether an ordinance for grading was to be passed by the board of supervisors of the city, it was demurrable on this ground.[83] It has been held to be sufficient, where the complaint is in effect an indebitatus assumpsit count at common law, and declares upon an executed contract, and it lacks the ordinary allegations of indebtedness, and that the services were rendered at defendant's request, which are not necessary when the consideration, as well as the promise, are implied from the nature of the transaction declared on.[84]

§ 705. **Object of labor. Well.** Where the allegations of the complaint merely show that materials were furnished for the construction and drilling of a "well," while it may be surmised from the corporate name of an oil-mining company therein alleged to be the owner thereof that such well is an oil-well, yet, in the absence of an allegation compelling such conclusion, it may be construed as a well constructed simply for the purpose of obtaining water.[85]

§ 706. **Claim of lien.**[86] **Time of filing.** In actions to foreclose liens upon the property, as in other cases, where the right of a person depends upon his doing a particular thing within a definite number of days after a certain event, it is necessary for him to allege and prove that the acts were performed within the time required by law.[87] So in an action to foreclose a lien, the plaintiff must allege that the claim of lien was filed within the proper time;[88] and so an

[83] Durrell v. Dooner, 119 Cal. 411, 51 Pac. Rep. 628.

[84] Donegan v. Houston (Cal. App., May 28, 1907), 90 Pac. Rep. 1073.

[85] Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 492, 82 Pac. Rep. 51.

[86] See, generally, "Claim of Lien," §§ 361 et seq., ante; "Materials," §§ 699 et seq., ante; "Demurrer," §§ 728 et seq., post.

Alaska. Claim of lien, generally: Jorgenson Co. v. Sheldon, 2 Alas. 607, 609.

[87] Cohn v. Wright, 89 Cal. 86, 88, 26 Pac. Rep. 643.

Not necessary to aver what plaintiff paid for recording claim of lien: Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144.

[88] For instance, before the amendment of 1897, within thirty days after the completion of the building: Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248 (subcontractor).

See "Time of Filing Claim," §§ 422 et seq., ante.

allegation that the claim of lien was filed "on or about" a certain date would be insufficient.[89] And the complaint is not subject to general demurrer, if it otherwise appears therefrom that the claim was filed within the proper time.[90]

§ 707. Same. Statutory completion for purpose of filing. Where, however, the contractor's material-man avers in his complaint that the contractor stopped all work on a certain day, and surrendered the contract and his rights thereunder to the owner, and that the latter accepted the structure and took possession thereof, and ever since continued in the occupation and use thereof, but does not aver how near the structure approached completion, it seems to be a sufficient allegation of the completion of the building for the purpose of filing liens, even if it appears that the contract is void.[91] An allegation of completion on a certain date was construed to mean actual completion.[92]

Colorado. Arkansas R. L. R. & C. Co. v. Flinn, 3 Colo. App. 381, 33 Pac. Rep. 1006.

Nevada. An omission so to plead can only be taken advantage of by demurrer: Skyrme v. Occidental M. Co., 8 Nev. 219. Likewise as to time of commencing suit: Id.

Oregon. Dalles L. Co. v. Wasco W. Mfg. Co., 3 Oreg. 527.

It must affirmatively appear from complaint that notice filed contained all essential provisions required by the statute; that it was proper in form, verified as required, and filed within the time prescribed: Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67; Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305. See Smith v. Wilkins (Oreg., May 1, 1897), 48 Pac. Rep. 708; Dalles L. Co. v. Wasco W. Mfg. Co., 3 Oreg. 527.

Utah. The claim of lien cannot be helped out by averments in the complaint: Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

[89] Cohn v. Wright, 89 Cal. 86, 89, 26 Pac. Rep. 643.

Oregon. So an allegation that the claim was duly made out and filed, as this is a conclusion of law: Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305; or where it is alleged to have been done "in pursuance of the statute in such cases made and provided": Smith v. Wilkins (Oreg., May 1, 1897), 48 Pac. Rep. 708.

[90] Wood v. Oakland & B. T. Co., 107 Cal. 500, 502; Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 493, 82 Pac. Rep. 51 (on a certain date "within thirty days after the completion of the said well," held sufficient).

See "Demurrer," §§ 728 et seq., post.

[91] Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 195, 198, 20 Pac. Rep. 419.

[92] Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 493, 82 Pac. Rep. 51.

§ 708. **Same. Alleging contents of claim. Generally.** Where the complaint as to the contents and requirements of the claim of lien substantially follows the language of the statute, and refers to the place of record of the claim, and the record was made a part of the complaint, it seems that the averments with respect to the claim are sufficient.[93]

§ 709. **Same. Name of owner.** Where the complaint alleged that the claim of lien stated the name of E. B. N. as the owner of the house and the reputed owner of a leasehold interest in the realty, and that the claim of lien stated that the owner of the fee of the real estate was not known at the time of filing the claim, it is a substantial averment that it was stated in the claim that neither the name of the real owner nor of the reputed owner was known to the plaintiff when he filed the claim.[94]

§ 710. **Same. Description of property to be charged with the lien.** It is sufficient for the complaint to allege that the claim of lien described the property; it is not necessary to allege in specific terms that the claim contained a "description of the property sufficient for identification."[95]

§ 711. **Same. Claim of lien as exhibit to complaint.** Where it is alleged in a complaint to foreclose a lien that a copy of the claim of lien is attached to and made a part of the complaint, whether it contains the statements required by the statute or not may be shown by referring to the claim.[96] And where a copy is so attached, it becomes a

[93] Barilari v. Ferrea, 59 Cal. 1, 2.

[94] West Coast L. Co. v. Newkirk, 80 Cal. 275, 276, 22 Pac. Rep. 231.
See "Claim of Lien," §§ 379 et seq., ante.

[95] Coss v. MacDonough, 111 Cal. 662, 667, 44 Pac. Rep. 325.
See "Description," §§ 399 et seq., ante.
As to complaint good against general demurrer on the ground that it did not allege that the claim of lien described the property sought to be charged with the lien, and the terms, time given, and conditions of the contract, a copy of the claim being annexed as an exhibit, see Georges v. Kessler, 131 Cal. 183, 63 Pac. Rep. 466.

[96] Russ L. Co. v. Garrettson, 87 Cal. 589, 594, 25 Pac. Rep. 747. See Cohn v. Wright, 89 Cal. 86, 89, 26 Pac. Rep. 643.
See §§ 699 et seq., ante.

part of the allegations of the complaint; for there can be no difference between setting forth such instrument in the body of the pleading and in annexing it as an exhibit, and making it a part of the pleadings by proper reference. In each case the copy is a part of the pleading. The only difference is in the arrangement or sequence of the parts, and this difference is unimportant upon the question whether the complaint states a cause of action. The copy may thus be referred to in order to ascertain whether the claim of lien described the property, and the terms, time given, and conditions of the contract.[97]

§ 712. Same. Terms, time given, and conditions of contract. And where such claim is so attached, and it states that the work was to be done and materials furnished "as specified in the plans and specifications of said buildings or structures," the complaint is good as against general demurrer, although it does not set forth the plans and specifications of the original contract.[98]

§ 713. Same. Variance between claim as an exhibit and allegations of complaint. A claim of lien attached as an exhibit, stating "there was no time specified for the commencement or completion of the work," and that payment was "to be made . . . upon completion of the work, or as

Alaska. Better practice to plead notice verbatim, or attach copy and make same part of complaint: Jorgenson Co. v. Sheldon, 2 Alas. 607, 609.

Arizona. Statement in exhibit, made part of complaint, cannot supply necessary allegation omitted from complaint: McPherson v. Hattich (Ariz., March 30, 1906), 85 Pac. Rpe. 731.

Oregon. Matthiesen v. Arata, 32 Oreg. 342, 50 Pac. Rep. 1015, 67 Am. St. Rep. 535; Pilz v. Killingsworth, 20 Oreg. 432, 26 Pac. Rep. 305.

Where the copy of the verification has the word "seal" written after the signature of the notary, it is sufficient, although there is no averment that the official seal was attached thereto: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571.

Washington. Bill, as exhibit, part of complaint: Fitch v. Applegate, 24 Wash. 25, 64 Pac. Rep. 147.

[97] George v. Kessler, 131 Cal. 183, 184, 63 Pac. Rep. 466.

See § 712, post.

[98] Slight v. Patton, 96 Cal. 384, 386, 31 Pac. Rep. 248.

See § 711, ante, and "Demurrer," §§ 728 et seq., post.

Montana. See Duignan v. Montana Club, 16 Mont. 189, 197.

required during its progress," and complaint alleging "that no time for said payment was or is stated or set forth in said contract or agreement," the complaint is not thereby rendered demurrable for uncertainty or ambiguity, since the law would require payment on completion of the work.[99]

§ 714. **Same. Unnecessary statements in claim as an exhibit.** An essential allegation of the complaint may control, notwithstanding an unnecessary statement in the claim of lien attached as an exhibit, and this does not render the complaint fatally defective. Thus a complaint is not fatally defective which alleges that the claim of lien was filed within thirty days after the completion of the building, and the claim of lien attached as an exhibit shows that it was filed after the time alleged in the complaint.[100]

§ 715. **Other interests.[101] For what purpose alleged.** With reference to this subject, it has been said by the court: "The complaints, after averring the performance of the work for which it is sought to enforce a lien on the land, allege that Cook has or claims some interest in the land, but that the same is subject to the plaintiff's lien. The court below treated the general denial in the answer as equivalent to a disclaimer of Cook that he had or claimed any interest in the land. This was error. The answer was only a denial of the issuable facts stated in the complaint, and the circumstance that Cook had, or claimed, some interest in the land was, of itself, wholly immaterial, except in so far as it showed that he was a necessary party to the

[99] Bryan v. Abbott, 131 Cal. 222, 224, 63 Pac. Rep. 363.

[100] Slight v. Patton, 96 Cal. 384, 386, 31 Pac. Rep. 248. The court said that it was evident that there was a clerical error in a date, and read "August" instead of "November."

Washington. Variance between allegations of the complaint and claim of lien attached as an exhibit, held to show a clerical error: Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001.

[101] Allegation of ownership of well and appurtenances, and owner and holder of an interest in the land: Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 495.

Colorado. San Juan H. Co. v. Carrothers, 7 Colo. App. 413, 43 Pac. Rep. 1053.

See, generally, Eaton v. Rocca, 75 Cal. 93, 16 Pac. Rep. 529.

action.[102] But the averment that his interest was subject to the plaintiff's lien presented a material issue, to which the answer was responsive. The answer, therefore, was not a denial that he had, or claimed, an interest in the land, but only of the fact that it was subject to the plaintiff's lien." [103]

[102] Rhodes, J., in concurring, disputed this point. See Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248; Donohoe v. Trinity Consol. G. & S. M. Co., 113 Cal. 119, 121, 45 Pac. Rep. 259.

[103] Elder v. Spinks, 53 Cal. 293, 294. See Pennie v. Hildreth, 81 Cal. 127, 131, 132, 22 Pac. Rep. 398.

In Sichler v. Look, 93 Cal. 600, 608, 29 Pac. Rep. 220, it was said: "The averment in the complaint, that the appellant 'has or claims to have some interest or claim upon said premises, which interest or claim is subsequent to and subject to the lien of the plaintiff's mortgage,' was for the purpose of showing that the appellant is a proper party defendant, and is sufficient therefor. The character of his interest is immaterial to the plaintiff, and need not be set forth in the complaint: Poett v. Stearns, 28 Cal. 226; Anthony v. Nye, 30 Cal. 401. Such an averment is not an issuable fact: Elder v. Spinks, 53 Cal. 293. If the appellant had desired to protect such interests, he should have appeared and presented it to the court with the grounds upon which he claimed its protection. If he has any interest in the mortgaged premises paramount to the mortgage, it will not be affected by the judgment or the sale thereunder." This case does not seem to properly state the decision in Elder v. Spinks, supra.

The court further said: "The complaint, however, alleges that the defendant claims some interest in the premises adverse to the plaintiff, and 'that the claim of said defendant is without any right whatever, and defendant has not any estate, right, title, or interest whatever in or about said premises, or any part thereof.' The answer admitted that the defendant had some claim to the property, but denied tnat the claim was without right, and denied that defendant had not any estate or right therein. This, as was held in Elder v. Spinks, 53 Cal. 293, raised a material issue; and, although the pleader should undoubtedly have proceeded to set out the nature of the interest claimed by the defendant, still there was no demurrer to the answer, and it does not appear that any objection was taken to the evidence introduced under the issue as made. The objection now urged — that the finding of fact is without the issues, and cannot therefore be considered — cannot be sustained": Tompkins v. Sprout, 55 Cal. 31, 35 (action to set aside deed).

In Pennie v. Hildreth, 81 Cal. 127, 131, 132, 22 Pac. Rep. 398, it was said: "The appellant insists that the court below erred in sustaining the demurrer to his answer, and rendering judgment against him. This depends upon whether an answer of general denial to an unverified complaint puts in issue any material fact in an action to quiet title. Counsel for respondent contend with seeming confidence that such an answer presents no issue to be tried. This is based upon the theory that in this class of cases the only course for a defendant to take is to set up affirmatively his adverse claim to the land, or disclaim. They cite in support of this position Tompkins v. Sprout, 55 Cal. 31; People v. Center, 66 Cal. 551, 5 Pac. Rep. 263, 6 Pac. Rep. 481. These cases do not support the position taken by respondent. They simply hold that, in order to maintain his defense on the ground of an adverse claim, a defendant must set up such claim, and that the owner in possession may require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined.

In another case it was said: "The denial in the answer of the allegation in the complaint, that the interests or claims of the defendants answering were subordinate and subject to the liens of the plaintiffs, did not cast upon them the burden of proving that allegation. If the defendants, in their answer to that allegation, had stated facts which showed that their claim was not subordinate or subject to the liens of the plaintiffs, they would have had the affirmative of the issue. And it was their 'business, when thus called upon, to disclose' the nature of their claim. By not doing so, they certainly occupy no better position than they would if they had done so. Conceding that the denial of the defendants raised an issue, we think it was one of which they had the affirmative, and as they introduced no evidence to support it, the court was justified in finding that their lien was subordinate and subject to the plaintiffs'." [104] Where the only interest sought by the plaintiff to be charged with the lien is the interest of the employer in the premises held under a contract of sale, and the allegation is that the person holding the legal title has or claims some interest in the premises, it must be construed as an averment of the interest in the title held by the vendee, and not of a title prior or superior to that of the vendee, as the plaintiff's lien did not affect the title held by the owner, and as the title was not a proper subject of litigation in the action to foreclose the lien against the interest of the vendee, and not to ascertain or determine the respective rights or interests of the vendee and owner as against each other.[105]

But the basis of his right to require the adverse interest to be produced and adjudicated is his own interest in or ownership of the land. This is the one thing necessary for him to prove, in order to make out his case. If it is denied, a material issue is raised, which casts upon him the burden of proving such interest or ownership. Until he does this, the defendant is not called upon to produce or prove his claim. Therefore the general denial put in issue a fact necessary to the plaintiff's recovery, and the demurrer to it was improperly sustained." See Harmon v. Ashmead, 68 Cal. 321, 323, 9 Pac. Rep. 183.

See "Burden of Proof," §§ 785 et seq., post.

[104] Harmon v. Ashmead, 68 Cal. 321, 323, 9 Pac. Rep. 183; citing Anthony v. Nye, 30 Cal. 401.

[105] Worden v. Hammond, 37 Cal. 61, 65 (1862). See Sichler v. Look, 93 Cal. 600, 608, 29 Pac. Rep. 220.

Washington. And so a complaint for foreclosure which makes the assignee of the estate of the purchaser of the materials a party, and,

§ 716. Same. Alleging no other claim upon fund. It is not necessary for plaintiff to allege that no one else has a claim upon the fund in the hands of the owner of the building. If any other party also claims the same fund, it will be determined when set up in some proper manner. Without its being so set up, the court should not presume that it exists, nor is the court bound upon mere demurrer to the complaint to act upon any theory that there may possibly be any such claim.[106]

§ 717. Description of property.[107] Speaking of this subject, the court has said: "In an action to foreclose the lien, it is, however, necessary that the property which the plaintiff seeks to subject to a sale therefor should be definitely described, and that the judgment should specifically designate the property affected by the lien and directed to be sold, otherwise the officer executing the judgment can neither point out the property which he offers for sale, nor place the purchaser in possession thereof, and the deed which he may execute will not convey any title; and as the judgment must follow the complaint, it is essential that the complaint should itself contain such specific description. In the complaint of the Los Angeles Planing Mill Company it is alleged that the building is 'upon that certain lot or parcel of land situate in the city and county of Los Angeles, state of California, at the northwest corner of Eighth and Hope streets.' A conveyance in which that was the only description would be void for uncertainty. In the complaints of the other plaintiffs the lot is described as 'lot six (6) in

without describing him as assignee, merely alleges that he has some interest in the premises, must be interpreted as directed against such party's interest in his personal capacity, and not as assignee: Quinby v. Slipper, 7 Wash. 475, 35 Pac. Rep. 116, 38 Am. St. Rep. 899.

Allegation that defendant has or claims to have a lien, inserted only for the purpose of having court determine priority between plaintiff and defendant lienors, without service of sufficient cross-complaint: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 717.

[106] Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co., 2 Cal. App. 303, 305, 83 Pac. Rep. 292.

[107] See "Object of Labor," §§ 166 et seq., ante; "Description of Property," §§ 399 et seq., ante; "Claim," §§ 706 et seq., ante; "Extent of Lien," §§ 438 et seq., ante; "Decree," §§ 903 et seq., post.

Owner in possession of premises, and alleged to have personal knowledge of the work, not misled by description in complaint and claim of lien: See Bryan v. Abbott, 131 Cal. 222, 224, 63 Pac. Rep. 363.

block twenty-eight (28), of the Huber tract, in said city,' one of said complaints stating that said lot is 'situate at the corner of Hope and Eighth streets, in said city,' and the other that it is at the northeast corner of said streets. The court, however, found that the building is upon the lot, in said city, 'on the northeast corner of Eighth and Hope streets, said lot being more particularly described as lot 6, and the southerly ten feet of lot 7, block 28, of the Huber tract.' In its decree, it, however, directs that only that part of the building which is upon lot 6 shall be sold. . . . The statute [108] provides that 'the land upon which any building . . . is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment,' is also subject to the lien. The amount of land thus to be made subject to the lien is an issuable fact,[109] and can be determined by the court only when such issue is presented by the pleadings. The land upon which the building is constructed is necessarily subject to the lien, to the extent of the owner's interest therein, but if the plaintiff would claim that more than that is required for the convenient use and occupation of the building, and have the same sold in satisfaction of his lien, he must make appropriate averments therefor. Although the finding of the court that the southerly ten feet of lot 7 and the northerly thirty-nine feet of lot 6 are required for the convenient use and occupation of said building was in accordance with evidence introduced therefor, neither of the complaints made any such averment, and before making such finding, the court should have directed the complaints to be amended therefor." [110]

§ 718. Same. Land for convenient use and occupation. It was said by the court: "In Green v. Chandler,[111] — the case upon which appellants rely, — it appeared that the

[108] **Kerr's Cyc. Code Civ. Proc.**, § 1185.

[109] Citing Green v. Chandler, 54 Cal. 626.

[110] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 210, 29 Pac. Rep. 633. **Montana.** See Helena L. Co. v. Montana Cent. R. Co., 10 Mont. 81, 24 Pac. Rep. 702.

[111] 54 Cal. 626.

structure in controversy was built upon a tract of land containing something over eight acres. The court found that the whole of said parcel with its appurtenances was required for the convenient use and occupation of the mill, etc. It was held on appeal that this finding was not within any of the issues made by the complaint and answer, and that there was no evidence upon which the court could determine that the whole or any particular part of the land was necessary for the use and occupation of the structure. It was apparent to the court in that case that the court below had decreed the sale of a larger tract of land than that actually occupied by the building upon which the lien was filed; and as there was no allegation, either in the complaint or in the answer, that all of the land was necessary for the convenient use and occupation of the building, the court held that the finding, being outside of any issue, did not warrant the judgment. In Sidlinger v. Kerkow,[112] it did not appear that the plaintiff was claiming any more land than that occupied by the building, and we held that the failure of the court to define the exact amount or extent of the land necessary for the convenient use of the structure did not invalidate the decree that the purchaser would acquire only the land covered by the building. The land actually occupied by the building is necessarily subject to the lien, and it is only where the plaintiff claims that more than that is required for its use and occupation, that he must make averments therefor.[113] There is nothing in the record in this case to show that the land described in the decree is greater in extent than that covered by the building. We have to assume that it is not. Every presumption must be indulged in favor of the judgment." [114]

[112] 82 Cal. 42, 22 Pac. Rep. 932.

[113] Citing Willamette S. M. Co. v. Kremer, 94 Cal. 205, 29 Pac. Rep. 633.

[114] Sachse v. Auburn, 95 Cal. 650, 651, 30 Pac. Rep. 800. See Tibbetts v. Moore, 23 Cal. 208, 213.

Colorado. Not necessary to aver that the land described is necessary for the convenient use and occupation of the building: See Seely v. Neill, 37 Colo. 198, 86 Pac. Rep. 334.

New Mexico. See Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541, **citing** Green v. Chandler, 54 Cal. 626.

§ 719. **Same. Description of whole or part of building.** And in another case it was said: "In direct line with the claim made by the lien follows the allegation of the complaint, as follows: 'That on or about the twenty-fifth day of October, 1889, the defendant, T. J. Ludwig, entered into a contract with the defendants, A. Marks and B. Marks, whereby the said Ludwig agreed to provide all materials, and add to and change into a two-story brick building the one-story brick building then upon the premises above described' (referring to the entire lot). This allegation of the complaint is not denied, and therefore no issue is made by the pleading as to whether or not the claim of lien covers an entire building or only a part thereof. Such being the fact, appellant was not authorized to introduce evidence against his own admission. The findings of the court also fully support the allegations of the complaint in this regard, and the judgment follows the findings. Hence the difficulties that arose in the Willamette case [115] are not present here." [116]

§ 720. **Same. Description in claim of lien referred to.** In an action to foreclose a lien, where the claim of lien contains an accurate description of the lot, "together with the building thereon," upon which the lien is claimed, a reference may be had to the same to obviate uncertainty in other directions; and where it is averred in the complaint that a claim of lien contains a description of the property sufficient for identification, and this allegation is borne out by an inspection of the claim referred to, the complaint is sufficient, so far as the description is concerned.[117]

Plaintiff may disregard lack of precision in his notice, and may enlarge the description in his complaint in foreclosure in such manner that the judgment will distinctly specify the land which is to be sold.[118]

[115] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 210, 29 Pac. Rep. 633.
[116] Brunner v. Marks, 98 Cal. 374, 376, 33 Pac. Rep. 265.
[117] Newell v. Brill, 2 Cal. App. 61, 64, 83 Pac. Rep. 76.
[118] Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac Rep. 1077, 1081.

§ 721. Damages. In an action for damages for breach of the contract, there need be no allegation of demand for the damages.[119]

Attorneys' fees. And no allegation need be inserted in the complaint for the foreclosure of a lien on the property relative to the claim of plaintiff for attorneys' fees, where they are properly allowed by the statute; and an allegation on that subject, if made, does not bind even the party making it.[120]

[119] Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637, 639.

Attorneys' fees paid out recoverable as damages. Where the bond of a contractor provides for the cancelation and release of the building, by the contractor, within thirty-five days after the completion, from all liens that might accrue against the same, and to save the owner harmless from all damages therefrom, in an action by the owner to recover on the bond, where there has been a breach by the contractor, fees paid by the owner to an attorney to defend lien suits are damages proximately caused by the breach of the agreement to deliver the building free from such liens: Klokke v. Raphael, 6 Cal. App. Dec. 508, 96 Pac. Rep. 392.

Complaint held to state a good cause of action on general demurrer, and to allege sufficiently payment of such fees, in the absence of a demurrer on that specific ground: Klokke v. Raphael, supra.

Costs recoverable as damages. No claim, in complaint for money expended as costs in such suit, but only for attorneys' fees, the amount of such costs was improperly included in verdict: Klokke v. Raphael, supra.

Pleading damages under contract for liquidated damages: See Long Beach School Dist. v. Dodge, 135 Cal. 401, 405, 67 Pac. Rep. 499.

Alleging damages: Bryant v. Broadwell, 140 Cal. 490, 494, 74 Pac. Rep. 33.

Alleging prospective profits: See McConnell v. Corona City W. Co., 149 Cal. 60, 65, 85 Pac. Rep. 929.

Bringing action sufficient demand: See Sims v. Petaluma G. Co. (Cal., Sept. 18, 1900), 62 Pac. Rep. 300, s. c. 131 Cal. 656, 63 Pac. Rep. 1011.

Washington. Demand unnecessary; complaint; clearing land: See Stringham v. Davis, 23 Wash. 568, 63 Pac. Rep. 230.

[120] Clancy v. Plover, 107 Cal. 272, 274, 40 Pac. Rep. 394; Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 234, 39 Pac. Rep. 758. But see Skym v. Weske Cons. Co. (Cal., Dec. 18, 1896), 47 Pac. Rep. 116.

See §§ 935 et seq., post; and see unconstitutional clause as to attorneys' fees, § 40, ante.

No allegation as to attorneys' fees necessary: See Ah Louis v. Harwood, 140 Cal. 500, 507, 74 Pac. Rep. 41.

Colorado. Attorneys' fees recoverable without allegation: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 54.

New Mexico. Allegation of amount of attorneys' fees in complaint unnecessary: See Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

Washington. It seems that if such allegation is inserted, it should not be stricken out: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571.

§ 722. **Verification of complaint.** The law does not require the complaint for the foreclosure of mechanics' liens to be verified, as it is not one of the cases enumerated in the code, requiring verification, and hence the sufficiency of the verification thereto is immaterial upon a default judgment.[121]

§ 723. **Joinder of causes of action in complaint.**[122] Except as otherwise provided in the chapter on mechanics' liens on real property, the general principles laid down in the code are applicable to this subject of joinder.[123]

Several mining claims. Section eleven hundred and ninety-five [124] provides: "Any number of persons claiming liens may join in the same action." In connection with this matter, the court has said: Section eleven hundred and ninety-five of the Code of Civil Procedure, in reference to joinder, "does not say whether the lien must be all upon the same property, or simply against the same person. We incline to the former construction. . . . Taking the several [mining] claims to constitute one piece of property for the purposes of the mechanic's-lien law, we think there was no misjoinder of causes of action." "If several placer mining claims are adjoining each other and are owned by one company and worked as one mine, the liens of different persons upon different portions of the property may be joined in the same action, the counts being separately stated." [125]

§ 724. **Same. Designating causes of action separately.** And where there are several different liens united in the complaint, which may be done under section eleven hundred

[121] Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 493, 82 Pac. Rep. 51.

Compare: "Verification of Claim," § 410, ante.

Oregon. Verification by attorney: Willamette Falls Co. v. Riley, 1 Oreg. 183.

[122] See, generally, "Plaintiffs," §§ 659 et seq., ante.

[123] **Kerr's Cyc. Code Civ. Proc.,** §§ 427, 1198, and notes. See Remy v. Olds, 88 Cal. 537, 26 Pac. Rep. 355.

[124] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

[125] Malone v. Big Flat G. M. Co., 76 Cal. 578, 582, 18 Pac. Rep. 772; Curnow v. Happy Valley B. G. Co., 68 Cal. 262, 266, 9 Pac. Rep. 149. See Hooper v. Flood, 54 Cal. 218, 219.

and ninety-five of the Code of Civil Procedure, there is a sufficiently separate statement of each cause of action, where there is a distinct statement of the facts as to each lien, and there is no necessity that they should be numbered, or otherwise formally designated.[126]

§ 725. Same. Reference from one cause of action to another. Where the plaintiff is also the assignee of a number of other lien claims, he need not allege in full the cause of action upon each lien in a separate count; and if the first count is plainly divided into distinct paragraphs, accurately designated by Roman numerals, from I to X, the first paragraph containing certain necessary averments as to the land, and the subsequent counts commencing by referring to said paragraph I, and expressly making said paragraph a part of each subsequent cause of action as if incorporated therein, the judgment should not be reversed because paragraph I was not written in full in each of the other counts; the court saying, "Such pleading may be slovenly, but it is not bad enough to upset a judgment." [127]

§ 726. Same. Actions that may be united in one complaint. It is proper to unite a cause of action against the contractor with a foreclosure suit against the owner, in order to prevent a multiplicity of suits.[128] The complaint

[126] Booth v. Pendola, 88 Cal. 36, 42, 23 Pac. Rep. 200, 25 Pac. Rep. 1101, 24 Pac. Rep. 714.

[127] Green v. Clifford, 94 Cal. 49, 52, 29 Pac. Rep. 331. See Reading v. Reading, 96 Cal. 4, 6, 30 Pac. Rep. 803.

Colorado. A general averment as to service of notice and filing statement may be made at the beginning or end of the complaint, without inserting it in each cause of action united in the complaint: Rialto M. & M. Co. v. Lowell, 23 Colo. 253, 47 Pac. Rep. 263.

[128] Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 198, 20 Pac. Rep. 419. See Cox v. Western Pac. R. Co., 47 Cal. 87, 90.

See "Parties," §§ 659 et seq., ante.

Montana. And a personal judgment and foreclosure of the lien against a part-owner may in like manner be joined: Davis v. Alvord, 94 U. S. 545, bk. 24 L. ed. 283; and see Alvord v. Hendrie, 2 Mont. 115; Davis v. Bilsland, 85 U. S. (18 Wall.) 659, bk. 21 L. ed. 969.

New Mexico. Contra, as two causes of action, one at law, the other in equity, cannot properly be joined: Finane v. Las Vegas H. Co., 3 N. M. 256, 5 Pac. Rep. 725.

Washington. Stetson & P. M. Co. v. McDonald, 5 Wash. 496, 32 Pac. Rep. 108. Provided by Ballinger's Ann. Laws, § 5911; but previously

of a subclaimant is not demurrable for uniting two causes of action; one for work and material furnished as a subcontractor at the request of the contractor, and one for the same at the request of the owner.[129] But an action to enforce a lien on the property, or an action for a personal judgment against the owner, for the value of materials furnished may not be joined with an action against the owner as grantee to set aside a conveyance on the ground of fraud on creditors.[130]

§ 727. Same. Objections, how raised. The objection as to misjoinder, however, is waived, unless specially taken by demurrer or answer.[131] Objection that causes of action are not separately stated is to be made by motion, and not by demurrer for misjoinder.[132]

contra: Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. Rep. 923. See Hildebrandt v. Savage, 4 Wash. 524, 30 Pac. Rep. 643, 32 Pac. Rep. 109, and dissenting opinion, Tacoma L. & Mfg. Co. v. Wolff, 7 Wash. 478, 35 Pac. Rep. 115, 755.

See "Decree," §§ 903 et seq., post.

[129] Quale v. Moon, 48 Cal. 478, 482; Giant Powder Co. v. San Diego F. Co., 78 Cal. 193, 199, 20 Pac. Rep. 419; Wood v. Oakland & B. T. Co., 107 Cal. 500, 502, 40 Pac. Rep. 806.

Colorado. Joinder of cause of action by vendor of goods with action on assigned claim: See Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107, 1108.

[130] Macondray v. Simmons, 1 Cal. 393, 395.

Objection must be taken by answer or demurrer to the misjoinder, or it is waived: Macondray v. Simmons, supra. See Weimer v. Smith, 4 Utah 238, 245, 9 Pac. Rep. 293.

[131] Macondray v. Simmons, 1 Cal. 393, 395; Cox v. Western Pac. R. Co., 47 Cal. 87, 90.

Oklahoma. See El Reno E. Co. v. Jennison, 5 Okl. 774, 50 Pac. Rep. 144 (joinder of cause on express contract and on quantum meruit for articles not provided for in the express contract).

[132] Cause of action to foreclose a lien against owner, and action to recover personal judgment against grantee of the owner, who had assumed the debt and agreed to pay it: San Francisco P. Co. v. Fairfield, 134 Cal. 220, 226, 66 Pac. Rep. 255.

Washington. Motion to have causes of action stated separately against same property, improper; motion to make more definite and certain, proper: See Fitch v. Applegate, 24 Wash. 25, 64 Pac. Rep. 147.

CHAPTER XXXVI.

DEMURRER.

§ 728. Demurrer. Generally.
§ 729. General demurrer.
§ 730. Same. Filing claim of lien. Time of completion of building.
§ 731. Same. Cessation from work.
§ 732. Same. Claim of lien not setting forth plans and specifications.
§ 733. Same. Variance between claim as exhibit and body of complaint.
§ 734. Special demurrer. Misjoinder of parties.
§ 735. Same. Ambiguity and uncertainty. Conflict between claim as exhibit and body of complaint.
§ 736. Same. Conflict. Bond as exhibit and allegations of complaint.
§ 737. Same. Conclusions of law.

§ 728. Demurrer.[1] Generally. The general rules of law that are applicable to demurrers will not be considered in this chapter, and the plan of treatment elsewhere [2] outlined will not be repeated.

[1] **Alleging for first time upon appeal,** without special demurrer, failure to allege securing certificate of architect: See Wyman v. Hooker, 2 Cal. App. 36, 38, 83 Pac. Rep. 79.

Demurrer admitting ownership: See Bryan v. Abbott, 131 Cal. 222, 224, 63 Pac. Rep. 363.

Waiver by failure to demur: See "Misjoinder," §§ 723 et seq., ante; "Prevention of Performance, Non-payment," §§ 679 et seq., ante. And see "Complaint. In General," §§ 670 et seq., ante; "Appeal," §§ 956 et seq., post.

Demurrer to cross-complaint: See §§ 759 et seq., post.

Oklahoma. Answer superseding demurrer filed on same day: See Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

Failure to allege use of materials; defect waived: See Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

Washington. Demurrer to complaint alleging withdrawal of third party from work, but not alleging owner's knowledge or consent to such withdrawal: See Cochran v. Yoho, 34 Wash. 238, 75 Pac. Rep. 815.

Wyoming. Harmless error in overruling demurrer as to plea of payment: See Davis v. Big Horn L. Co., 14 Wyo. 517, 85 Pac. Rep. 980.

[2] See § 670, ante.

§ 729. **General demurrer.**[3] It is a general rule that if the complaint states a cause of action, it is not subject to general demurrer because of an ineffectual attempt to state another cause of action in the same or another count.[4] Thus —

Money judgment, and foreclosure of lien. A complaint which alleges a sufficient cause of action for the recovery of money against the owner is not subject to demurrer on the ground that it does not state facts sufficient to constitute a cause of action against the owner, because of the fact of an ineffectual effort to state in the complaint a cause of action for the foreclosure of a lien to secure the same money.[5]

§ 730. **Same. Filing claim of lien.**[6] **Time of completion of building.**[7] Where the complaint is merely uncertain, a general demurrer will not lie. Thus if the complaint to foreclose a subclaimant's lien upon the property alleges that the structure was completed "on or about" a date mentioned, it is not so indefinite and uncertain as to render the complaint defective as against general demurrer, especially where it is further alleged that the claim of lien was filed "within thirty days after the completion of the building and structure."[8]

[3] **Oklahoma.** Failure to allege attorney's fee not reached by general demurrer: See Savage v. Dinkler, 12 Okl. 463, 72 Pac. Rep. 366.

Washington. Failure to allege incorporation of defendant, not to be raised by general demurrer: See Sly v. Palo Alto G. M. Co., 28 Wash. 485, 68 Pac. Rep. 871.

[4] **One count stating good cause of action,** demurrer to second cause not considered on appeal: See Macomber v. Bigelow, 126 Cal. 9, 12, 58 Pac. Rep. 312.

General demurrer to be overruled when complaint good as to all but one payment, in suit to recover balance: Knowles v. Baldwin, 125 Cal. 224, 226, 227, 57 Pac. Rep. 988.

[5] Cox v. Western Pac. R. Co., 47 Cal. 87, 90.

See "Joinder," §§ 723 et seq., ante.

[6] See §§ 416 et seq., ante.

Washington. See Lee v. Kimball (Wash., March 12, 1907), 88 Pac. Rep. 1121.

[7] See §§ 334 et seq., ante.

[8] Wood v. Oakland and Berkeley R. T. Co., 107 Cal. 500, 503, 40 Pac. Rep. 806.

See "Complaint," §§ 677, 706 et seq., ante.

§ 731. Same. Cessation from work.[9] Where, in an action to foreclose a material-man's lien, the complaint averred that the structures were in an unfinished condition, that work ceased thereon "on or about the first day of April, 1894, and has not been resumed," and that plaintiff's claim of lien was filed and recorded May 8, 1894, while a cessation of work on April 9th might be within the meaning of the phrase "on or about the first day of April," yet the allegation as to the time of cessation is uncertain, and subject only to a special demurrer on that ground, and, in the absence of such demurrer, the plaintiff may prove that the work ceased on the first day of April, 1894, and the complaint is sufficiently certain as to the continuous duration of the cessation of the work for more than thirty days before the filing for record of the claim of lien, and that it was filed within thirty days after the constructive completion of the buildings.[10]

§ 732. Same. Claim of lien not setting forth plans and specifications. A subcontractor's complaint which avers that the claim of lien stated that he entered into a contract under which he was to do all the painting, staining, varnishing, and tinting, all necessary materials to be furnished by him, "as specified in the plans and specifications" of the buildings, is sufficient, at least where a general demurrer is interposed, and against the objection that the claim does not set forth the plans and specifications of the original contract in regard to the painting.[11]

§ 733. Same. Variance between claim as exhibit and body of complaint.[12] Where the complaint avers that the plaintiff was to be paid a certain sum for work only, while his claim of lien, set forth in the complaint, showed that

[9] See §§ 354 et seq., ante.

[10] San Joaquin L. Co. v. Welton, 115 Cal. 1, 5, 46 Pac. Rep. 735, 1057.

[11] Slight v. Patton, 96 Cal. 384, 387, 31 Pac. Rep. 248; but it was said that it was not necessary to determine whether a special demurrer on this ground should have been sustained.

[12] See §§ 711 et seq., ante.

he was to be paid such sum for work and materials furnished, a general demurrer should be sustained.[13]

§ 734. Special demurrer. Misjoinder of parties.[14] A demurrer lies for misjoinder of parties, where a mere agent is joined with the owner in an action to foreclose, and an error of the court in failing to overrule such demurrer is not cured by a subsequent finding of the court that the materials were furnished to the person as a contractor, and not as a mere agent.[15]

§ 735. Same. Ambiguity and uncertainty. Conflict between claim as exhibit and body of complaint.[16] Where, in an action to enforce a lien on the property, some of the allegations of the complaint are inconsistent with the statements contained in the claim of lien, a copy of which is attached to and made a part of the complaint, a demurrer for ambiguity and uncertainty should be sustained.[17]

[13] Wagner v. Hansen, 103 Cal. 104, 106, 37 Pac. Rep. 195.
See "Variances," §§ 835 et seq., post.

[14] See §§ 659 et seq., and §§ 723 et seq., ante.

[15] Hooper v. Flood, 54 Cal. 218, 220.
See "Owner," §§ 687 et seq., ante.

New Mexico. "It is a well-settled rule of equity pleading, that a misjoinder of parties as defendants can be taken advantage of only by the parties improperly joined, or, at most, by such parties as may be injuriously affected by such misjoinder." And where parties demur for misjoinder, and subsequently obtain a dismissal of the bill as to parties misjoined, they are not in a position to complain: Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

Misjoinder not affecting objecting party: See Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726, 729.

Oregon. Waiver of misjoinder by failure to demur or answer: Osborn v. Logus, 28 Oreg. 302, 38 Pac. Rep. 190, 42 Id. 997.

[16] See §§ 711, 713, ante.

[17] Frazer v. Barlow, 63 Cal. 71, 72; Palmer v. Lavigne, 104 Cal. 30, 33, 37 Pac. Rep. 775; Malone v. Big Flat G. M. Co., 76 Cal. 578, 581, 18 Pac. Rep. 772; Wagner v. Hansen, 103 Cal. 104, 106, 37 Pac. Rep. 195. See Blasingame v. Home Ins. Co., 75 Cal. 633, 637, 17 Pac. Rep. 925.

Uncertainty in the complaint waived by absence of objection in lower court: Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 493, 82 Pac. Rep. 51.

Contract alleged to be made "with the said defendants," thereupon naming one defendant, held good against special demurrer: See Georges v. Kessler, 131 Cal. 183, 185, 63 Pac. Rep. 466.

Demurrer for ambiguity; husband and wife parties to contract: See Georges v. Kessler, 131 Cal. 183, 185, 63 Pac. Rep. 466.

§ 736. Same. Conflict. Bond as exhibit and allegations of complaint.[18] Where, in an action on a contractor's bond, the complaint averred that the principals executed the bond, and the copy of the bond attached and made part of the complaint shows that it was not signed by the principals, the complaint is subject to a special demurrer on the ground of ambiguity.[19]

§ 737. Same. Conclusions of law. Where point is made against a subclaimant's complaint that there is no averment as to what was the contract price between the owner and contractors, or that there was any express agreement to pay anything, or as to what was the reasonable value of the work to be done, or anything to show that any sum ever became due under the original contract, and that the allegation that there was due and owing an amount in excess of the contract price was a statement of conclusions of law, it should be tested by demurrer, and, of course, if so tested, would be held insufficient.[20]

Demurrer for uncertainty; action on contractor's bond; defects not accurately stated; bill of particulars proper: See Long Branch School Dist. v. Dodge, 135 Cal. 401, 407, 67 Pac. Rep. 499.

Colorado. Uncertainty waived by general demurrer: See Gutshall v. Kornaley (Colo., Dec. 3, 1906), 88 Pac. Rep. 158.

Washington. Incorporating in subsequent causes of action paragraphs of previous cause of action, not reached on demurrer: See Sly v. Palo Alto G. M. Co., 28 Wash. 485, 68 Pac. Rep. 871.

[18] See § 735, ante.

[19] Kurtz v. Forquer, 94 Cal. 91, 94, 29 Pac. Rep. 413 (dictum).

Variance immaterial after trial on merits, where defendants not prejudiced thereby: Kurtz v. Forquer, supra, p. 95. See Rainsford v. Massengale, 5 Wyo. 1, 9, 35 Pac. Rep. 774.

Special demurrer that allegation of complaint is inconsistent with exhibit attached, without stating in what respect, not regarded on appeal: See Georges v. Kessler, 131 Cal. 183, 185, 63 Pac. Rep. 466.

[20] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 592, 25 Pac. Rep. 747.

As to materials furnished, special demurrer, see §§ 699 et seq., ante.

CHAPTER XXXVII.

ANSWER, AND OTHER PLEADINGS.

§ 738. Answer. In general.
§ 739. Same. General denial.
§ 740. Same. Denials of conclusions of law.
§ 741. Same. Negative pregnant.
§ 742. Same. Denials on information and belief.
§ 743. Same. Exception to rule.
§ 744. Same. Evasive denials.
§ 745. Same. Deficiencies of complaint cured by answer.
§ 746. Same. Special defenses.
§ 747. Same. Neglect of contractor to supply materials and proceed with work.
§ 748. Same. Abandonment.
§ 749. Same. Payments made by owner.
§ 750. Same. Void contract as defense.
§ 751. Same. Void contract no defense in personam.
§ 752. Same. Mechanic's lien as defense to mortgage foreclosure.
§ 753. Same. Counterclaim. Payments.
§ 754. Same. Judgment and costs in action against agent.
§ 755. Same. Orders paid.
§ 756. Same. Damages.
§ 757. Same. Future repairs.
§ 758. Same. Damages for delay.
§ 759. Cross-complaint.
§ 760. Same. Setting up mechanic's lien in mortgage foreclosure.
§ 761. Same. Damages.
§ 762. Same. Payments.
§ 763. Supplemental answer. Decree of foreclosure of mortgage.

§ 738. Answer.[1] In general. Where defendants have no separate or special defense, it seems that they may join in a common answer.[2]

[1] **Supplemental answer:** See § 763, post.

[2] Western L. Co. v. Phillips, 94 Cal. 54, 56, 29 Pac. Rep. 328 (minor defendants).

Allegation of amount due, admitted by answer, conclusive; and finding to contrary disregarded: Gamache v. South School Dist., 133 Cal. 145, 148, 65 Pac. Rep. 301.

Montana. Allegations, once denied, need not be denied again, although several times averred in complaint: Boucher v. Powers, 29 Mont. 342, 74 Pac. Rep. 942.

§ 739. **Same. General denial.** Under the familiar rule often laid down and illustrated, a general denial puts in issue only issuable facts. Thus where the plaintiff avers that the defendant has or claims some interest in the land, and that the same is subject to plaintiff's lien, this allegation being wholly immaterial, except in so far as it shows that he is a necessary party to the action, the general denial puts in issue only the fact that it is subject to the plaintiff's lien.[3]

A breach of the original contract cannot be shown under a general denial.[4]

§ 740. **Same. Denials of conclusions of law.** Denials of mere conclusions of law alleged in the complaint are insufficient. Thus the denial that the plaintiff has a lien,[5] or that a claimant was entitled to a lien,[6] or that the plaintiff has complied with the requirements of the provisions of chapter two, title four, part three, of the Code of Civil Procedure, relating to mechanics' liens,[7] is insufficient.

§ 741. **Same. Negative pregnant.** A negative pregnant, under the familiar rule, should be avoided. Thus where the complaint avers that the plaintiff performed labor on a mine at the request of the defendant, the answer, denying that the labor was performed at the request of the defendant, is not a denial that the work was performed on the mine.[8]

Assignment. Where the answer attempts to deny the assignment to and ownership of the claim in plaintiff, as

Failure to deny payment of liens alleged to be paid by owner under original contract: See Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054.

[3] Elder v. Spinks, 53 Cal. 293, 294.

But see "Pleading Priorities and Others Interests," §§ 715, 716, ante.

[4] McGuire v. Quintana, 52 Cal. 427, 428. See Michalitschke Bros. & Co. v. Wells, Fargo & Co., 118 Cal. 683, 690, 50 Pac. Rep. 847.

[5] Bradbury v. Cronise, 46 Cal. 287, 289; Curnow v. Happy Valley B. G. & H. Co., 68 Cal. 262, 266, 9 Pac. Rep. 149.

Montana. Merrigan v. English, 9 Mont. 113, 22 Pac. Rep. 454, 5 L. R. A. 837 (also, denial of indebtedness).

[6] Brill v. De Turk, 130 Cal. 241, 244, 62 Pac. Rep. 462.

[7] Curnow v. Happy Valley B. G. & H. Co., 68 Cal. 262, 266, 9 Pac. Rep. 149.

[8] Bradbury v. Cronise, 46 Cal. 287, 289. See Lingard v. Beta Theta Pi Assoc. (Cal., Feb. 2, 1899), 56 Pac. Rep. 58 (time of filing claim, and its sufficiency).

alleged in the complaint, and such denial is pregnant with an admission of those facts, it is unnecessary to introduce any evidence on the subject of the assignment.[9]

Amount due. So where the answer does not deny that a valid contract was entered into between the parties, and admitted that a certain sum was due, and also denies "that any sum was due from her to said B. on the sixth day of July, 1891, or at any other time, or at all, pursuant to said contract, or otherwise," it must be treated as a denial only that any sum of money was due under the contract.[10]

Value of labor. But a denial that the value of labor was not over a certain sum, less than that averred in the complaint, is a denial that its value was as averred in the complaint.[11]

§ 742. Same. Denials on information and belief. The defendant is not at liberty to deny on information and belief,[12] nor to answer an allegation alleging that he has no information or belief upon the subject sufficient to enable

[9] Newell v. Brill, 2 Cal. App. 61, 64, 83 Pac. Rep. 76.

[10] Schmid v. Busch, 97 Cal. 184, 187, 31 Pac. Rep. 893.

Washington. So the denial of indebtedness in a certain sum claimed is an admission of a less sum: Rourk v. Miller, 3 Wash. 73, 27 Pac. Rep. 1029.

[11] Way v. Oglesby, 45 Cal. 655. See Goddard v. Fulton, 21 Cal. 430, 436; Robinson v. Merrill, 87 Cal. 11, 14, 25 Pac. Rep. 162; Burris v. People's Ditch Co., 104 Cal. 248, 253, 37 Pac. Rep. 922.

[12] Hagman v. Williams, 88 Cal. 146, 150, 25 Pac. Rep. 1111.

Answer must be positive when matters presumptively within his knowledge: Curtis v. Richards, 9 Cal. 33, 37; Humphreys v. McCall, 9 Cal. 59, 62, 70 Am. Dec. 621; San Francisco Gas Co. v. San Francisco, 9 Cal. 453, 473; McCormick v. Bailey, 10 Cal. 230, 232; Ord v. Steamer Uncle Sam, 13 Cal. 369, 371; Brown v. Scott, 25 Cal. 189, 196; Davanay v. Eggenhoff, 43 Cal. 395, 397; Walker v. Buffandeau, 63 Cal. 312, 314; Loveland v. Garner, 74 Cal. 298, 300, 15 Pac. Rep. 844; Hagman v. Williams, 88 Cal. 146, 150, 25 Pac. Rep. 1111; Gribble v. Columbus B. Co., 100 Cal. 67, 75, 34 Pac. Rep. 527; Mulcahy v. Buckley, 100 Cal. 484, 489, 35 Pac. Rep. 144; Weill v. Crittenden, 139 Cal. 488, 490, 73 Pac. Rep. 238. See Hanna v. Barker, 6 Colo. 308; State ex rel. Milsted v. Butte City W. Co., 18 Mont. 199, 203, 44 Pac. Rep. 966, 56 Am. St. Rep. 575; Lay G. M. Co. v. Falls etc. Mfg. Co., 91 N. C. 75; In re Mills's Estate, 40 Oreg. 424, 433, 67 Pac. Rep. 107; Bartow v. Northern Assur. Co., 10 S. D. 132, 136, 72 N. W. Rep. 86; Thompson v. Sken, 14 Utah 209, 214, 46 Pac. Rep. 1103.

See notes 70 Am. Dec. 629; 88 Am. Dec. 95; 97 Am. Dec. 231.

Where matters not presumably within knowledge of defendant, the rule is otherwise: See Vassault v. Austin, 32 Cal. 597, 607; Read v. Buffum, 79 Cal. 77, 21 Pac. Rep. 555, 12 Am. St. Rep. 131; Hagman v. Williams, 88 Cal. 146, 150; 25 Pac. Rep. 1111; Etchas v. Orena, 121 Cal.

him to answer it, and placing his denial on that ground, if he may be presumed to know, or when he is aware, before answering, that he has the means of ascertaining, whether or not such allegation is true.[13]

Recorded claim of lien. This is, for instance, the rule where it appears that the defendant knew before answering that he could certainly ascertain whether or not plaintiff had recorded his claim of lien, as alleged in the complaint, by examining a public record in the city and county in which his lots, upon which the lien in claimed, were situated.[14] So an allegation of the complaint, in due form, that plaintiff filed and recorded his claim of lien in the office of the recorder of the county, "in words and figures following," and then setting forth a copy of his claim of lien, is not put in issue by a denial of the answer upon the ground that the defendant has no information or belief upon the subject sufficient to enable him to answer the same.[15]

§ 743. **Same. Exception to rule.** This rule, however, does not apply to a denial of the sufficiency of the recorded claim of lien in an action to foreclose a mechanic's lien, where the complaint alleges that the claim of lien was duly recorded, and states its contents substantially in the language of the statute; and if the recorded claim of lien is inartificially drawn, and not in the language of the complaint, a denial in the answer, upon information and belief, that the claim contains the necessary facts, is sufficient to raise an issue as to the alleged claim of lien.[16]

270, 53 Pac. Rep. 798; Oregonian etc. Co. v. Oregon etc. Co., 10 Sawy. C. C. 468, 22 Fed. Rep. 247.

Denial for want of information is bad as to matters presumably within the defendant's knowledge: Curtis v. Richards, 9 Cal. 33, 38; Weill v. Crittenden, 139 Cal. 488, 490, 73 Pac. Rep. 238; Peacock v. United States, 125 Fed. Rep. 586.

Montana. Denial of knowledge or information sufficient to form belief as to the existence of public records: See McEwen v. Montana P. & P. Co. (Mont., June 3, 1907), 90 Pac. Rep. 359, 360.

[13] Mulcahy v. Buckley, 100 Cal. 484, 487, 35 Pac. Rep. 144.

[14] Mulcahy v. Buckley, 100 Cal. 484, 487, 35 Pac. Rep. 144.

Washington. But, see contra: Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. Rep. 458.

[15] Mulcahy v. Buckley, 100 Cal. 484, 487, 35 Pac. Rep. 144.

[16] Hagman v. Williams, 88 Cal. 146, 150, 25 Pac. Rep. 1111.

§ 744. **Same. Evasive denials.** Where the complaint avers "that plaintiff performed work and labor on the property as a miner," and the answer admits the ownership of the property in the defendant, and the employment of plaintiff by the defendant's superintendent, and the answer alleges that "defendant is not sufficiently informed to admit that the plaintiff performed work and labor as a miner upon the property of defendant, and therefore defendant denies said allegation," the words "as a miner" render the denial equivocal and evasive, and raise no issue as to the identity of the property upon which the work was done.[17]

§ 745. **Same. Deficiencies of complaint cured by answer.** Certain deficiencies of the complaint may be cured by allegations of the answer. Thus where the complaint in an action to foreclose a subclaimant's lien upon the property, under a valid contract, did not aver that any money was due to the contractor, but the answer presented that issue, under section five hundred and eighty,[18] the court may grant any relief consistent with the case made by the complaint and embraced within the issues.[19]

§ 746. **Same. Special defenses.**[20] Notice by the owner that he would not be responsible for the construction of the building, under section eleven hundred and ninety-two,[21]

[17] Curnow v. Happy Valley B. G. & H. Co., 68 Cal. 262, 265, 9 Pac. Rep. 149.

[18] **Kerr's Cyc. Code Civ. Proc.,** § 580, and note.

[19] O'Donnel v. Kramer, 65 Cal. 353, 4 Pac. Rep. 204 (a certain amount was, however, actually found due).

[20] See "Rights of Owner," §§ 510 et seq., ante; "Obligations of Original Contractor," §§ 64 et seq., ante; "Material-man," § 102, ante; "Laborers," §§ 117 et seq., ante; "Cumulative Remedies," §§ 638 et seq., ante; "Performance of the Contract," §§ 334 et seq., ante; "Complaint," §§ 670 et seq., ante.

Nevada. Lack of authority of alleged agent should be pleaded: Dickson v. Corbett, 11 Nev. 277.

[21] **Kerr's Cyc. Code Civ. Proc.,** § 1192.

Answer alleging credit given by laborer in a mine to person in possession under contract with owner to improve and develop, a sufficient defense: See Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 290, 65 Pac. Rep. 578.

Release from liability at time of signing contract sufficient defense: See Rauer v. Fay, 128 Cal. 523, 525, 61 Pac. Rep. 90.

is a matter of defense, to be specially pleaded.[22] So another action pending;[23] or a breach of a valid original contract;[24] or the non-completion of the building according to the contract;[25] or the subcontracting for materials without the consent of the owner;[26] or a defense that the plaintiffs, claimants, had guaranteed performance of the statutory original contract,[27] — must be specially pleaded in the answer.

§ 747. Same. Neglect of contractor to supply materials and proceed with work. Where a valid non-statutory original contract provided "that should said contractor refuse or neglect to supply a sufficiency of materials, the owner shall have power to provide materials and workmen after three days' notice in writing being given to finish the said work, and the expense will be deducted from the amount

Colorado. Answer. Allegation that miner was unacquainted with and unused to mining stricken out: See Ontario-Colorado G. M. Co. v. Mackenzie, 19 Colo. App. 298, 74 Pac. Rep. 791.

Striking out allegation of tender, repeated in same form in answer, not error: See Ontario-Colorado G. M. Co. v. Mackenzie, 19 Colo. App. 298, 74 Pac. Rep. 791.

Improper allegations in answer stricken out: See Ontario-Colorado G. M. Co. v. Mackenzie, 19 Colo. App. 298, 74 Pac. Rep. 791.

Oregon. Where a subclaimant, for a valuable consideration moving from the owner, waives his lien, the answer may set up such waiver, instead of setting up matters which gave rise to it, by way of estoppel: Hughes v. Lansing, 34 Oreg. 118, 55 Pac. Rep. 95, 97, 75 Am. St. Rep. 574.

Wyoming. Estoppel as to full amount due under partial statement furnished: See Big Horn L. Co. v. Davis, 14 Wyo. 455, 85 Pac. Rep. 1048, 84 Id. 900.

[22] West Coast L. Co. v. Newkirk, 80 Cal. 275, 277, 22 Pac. Rep. 231.

[23] Griffith v. Happersberger, 86 Cal. 605, 612, 25 Pac. Rep. 137, 487.

Setting up action to foreclose prior mortgage: Bewick v. Muir, 83 Cal. 373, 23 Pac. Rep. 390.

[24] See Kelley v. Plover, 103 Cal. 35, 37, 36 Pac. Rep. 1020; Griffith v. Happersberger, 86 Cal. 605, 609, 25 Pac. Rep. 137, 487.

[25] McGuire v. Quintana, 52 Cal. 427, 428.

Colorado. Non-completion within contract time: McIntyre v. Barnes, 4 Colo. 285. See Charles v. Hallack C. & Mfg. Co., 22 Colo. 283, 43 Pac. Rep. 548.

Utah. Damages in action by subclaimants to foreclose liens: Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85.

[26] Blethen v. Blake, 44 Cal. 117, 120.

[27] Kelley v. Plover, 103 Cal. 35, 37, 36 Pac. Rep. 1020. See Bragg v. Shain, 49 Cal. 131, 132.

See § 619, ante.

of the contract," the answer of the owner to a subclaimant's complaint of foreclosure should show that the contractor, having neglected to supply a sufficiency of materials, was notified by the owner to proceed with the work in three days, or that he (the owner) would complete the house himself, if he seeks to take advantage of this clause of the contract.[28]

§ 748. Same. Abandonment. In the case stated in the preceding section, where the owner defends by showing the amount paid by him to the original contractor before the abandonment by such contractor of his work and contract, and the amount paid for completing the building, the answer must allege that the sum so paid by the owner to the contractor was due when the same was paid; that the aggregate of liens foreclosed exceeds the amount which was to be paid by the owner under the contract; and that the sums paid by him after the alleged abandonment were paid to complete the building according to the terms of the contract.[29]

§ 749. Same. Payments made by owner. Where the answer to a subclaimant's complaint shows that the original contract was a non-statutory original contract, and that the payments were all made in accordance with the contract, and before notice of plaintiff's claim, the answer is sufficient.[30]

[28] Quale v. Moon, 48 Cal. 478, 482.

Pleading conditions, generally: See § 676, ante.

[29] Quale v. Moon, 48 Cal. 478, 482.

See "Invalid Contract," §§ 319 et seq., ante; "Abandonment," §§ 358 et seq., ante; "Notice," §§ 547 et seq., ante; "Valid Contract," §§ 315 et seq., ante; "Lien as Limited by Contract," §§ 452 et seq., and §§ 315, 355, 559, ante.

New Mexico. Where certain land was to be given as part payment, defendant must allege tender of a sufficient deed thereof: Ford v. Springer Land Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

Washington. Defendant must specially plead payment: Spokane Mfg. & L. Co. v. McChesney, 1 Wash. 609, 612.

[30] Kerckhoff-Cuzner M. & L. Co. v. Cummings, 86 Cal. 22, 26, 24 Pac. Rep. 814.

See "Liability," §§ 547 et seq., ante; "Invalid Contract," §§ 319 et seq., ante; "Valid Contract," §§ 315 et seq., ante.

§ 750. Same. Void contract as defense. Where the statutory original contract is void, it has been held that it is not available as a defense for any purpose, either to determine the amount of the contract price or to limit the liability of the owner, or as the foundation of a right to complete the building according to its terms,[31] or for damages for breach of the contract;[32] but the limitations upon these rules have been already pointed out.[33]

Plans and specifications referred to in contract, but not filed. Where the answer sets out a statutory original contract providing that the work should be done "conformable to the drawings and specifications made by C. E. S. and signed by the parties, within the time aforesaid," the averment is insufficient, if it fails to show that the plans and specifications were filed.[34]

§ 751. Same. Void contract no defense in personam. An allegation showing that the statutory original contract is void is no defense to an action in personam by the contractor on the implied contract;[35] likewise an allegation that the implied contract was not recorded, or that the work and materials were done and furnished in pursuance of a statutory original contract which was not filed for record.[36]

§ 752. Same. Mechanic's lien as defense to mortgage foreclosure. Where it is charged in the complaint for the

[31] Willamette S. M. Co. v. Los Angeles College Co., 94 Cal. 229, 240, 29 Pac. Rep. 629.

See cross-references in note 33, infra.

[32] Rebman v. San Gabriel Valley L. & W. Co., 95 Cal. 390, 395, 30 Pac. Rep. 564. See White v. Fresno Nat. Bank, 98 Cal. 166, 168, 32 Pac. Rep. 979.

See cross-references in note 33, infra.

[33] See §§ 319 et seq., § 559, and §§ 543 et seq., ante.

[34] Holland v. Wilson, 76 Cal. 434, 436, 18 Pac. Rep. 412. And see White v. Fresno Nat. Bank, 98 Cal. 166, 168, 32 Pac. Rep. 979 (which says that the question arose on special demurrer).

See "Filing Plans and Specifications," §§ 294 et seq., ante.

[35] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 395, 30 Pac. Rep. 564.

But see §§ 319 et seq., §§ 543 et seq., and § 559, ante.

[36] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 395, 30 Pac. Rep. 564. But see note preceding.

foreclosure of a mortgage that the defendants have or claim some interest in the mortgaged premises, the interest, if it be a mechanic's lien paramount to the mortgage, may be set out by way of answer.[37]

§ 753. Same. Counterclaim. Payments. The owner may properly set out as a counterclaim, where his claimant seeks to enforce a lien, that the defendant, "to avoid threatened litigation," paid to plaintiffs, upon a certain day before the date of an alleged contract for materials, an amount of money in excess of what was then due plaintiffs for materials before that time furnished.[38]

Payment of lien claims. In an action by the original contractor in personam on the implied contract, the statutory original contract being void, the owner may set off the amount paid by him upon foreclosure of liens of material-men for materials furnished the contractor, including the amount allowed and paid for attorneys' fees and costs, as well as for principal and interest on the liens.[39]

§ 754. Same. Judgment and costs in action against agent. Where the complaint of the original contractor is in indebitatus assumpsit, the amount of a judgment and costs

[37] Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 354.

See §§ 715, 716, ante, and § 760, post.

Oregon. It seems that a defendant may set up a lien upon the property in his answer: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

[38] Clark v. Taylor, 91 Cal. 552, 554, 27 Pac. Rep. 860 (probably decided under § 438, subd. 1, Code Civ. Proc.). See the case explained in Griswold v. Pieratt, 110 Cal. 259, 266, 42 Pac. Rep. 820.

Counterclaim: See §§ 515 et seq., ante.

Payment of liens by owner; counterclaim: See Wilson v. Nugent, 125 Cal. 280, 282, 57 Pac. Rep. 1008.

Montana. Reply to counterclaim denying knowledge or information sufficient to form belief: See McEwen v. Montana P. & P. Co. (Mont., June 3, 1907), 90 Pac. Rep. 359, 360.

[39] Covell v. Washburn, 91 Cal. 560, 562, 27 Pac. Rep. 859. See Marchant v. Hayes, 117 Cal. 669, 672, 49 Pac. Rep. 840. See "Obligations of Owner," §§ 523 et seq,, ante; "Attorneys' Fees," § 721, ante.

Oregon. In a suit by a subclaimant to foreclose his lien, it seems that the owner may set up against the contractor the excess of liens paid by him over the contract price: Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649.

in another suit, brought by a subcontractor against the agent of the defendant for certain work under the original contract, cannot be deducted from the balance unpaid on the original contract, and cannot affect the amount recoverable by the contractor, when the latter was not a party to such suit.[40]

§ 755. **Same. Orders paid.** Where the contractor has given orders to the owner of the building in favor of material-men, who afterwards filed liens upon the property, and the owner, at the date of the orders, was indebted to the contractor in excess of that amount, and agreed to pay the orders, the liens should be offset, in a suit by the contractor against the owner, only for the amount due at the date of the orders, and not for the costs and expenses of the liens.[41] But where there is no promise to pay such orders, the rule is otherwise.[42]

§ 756. **Same. Damages.** And the damages sustained by the owner may be set off in the answer against a plaintiff who is a bondsman on the contractor's bond,[43] as well as against the contractor himself.[44]

§ 757. **Same. Future repairs.** Where the answer of the employer, in an action by the contractor, sets up a counter-

[40] Griffith v. Happersberger, 86 Cal. 605, 614, 25 Pac. Rep. 137, 487.
See "Agency," §§ 572 et seq., ante.

[41] Covell v. Washburn, 91 Cal. 560, 562, 27 Pac. Rep. 859.
Setting off liens, costs, and expenses: See Adams v. Burbank, 103 Cal. 646, 650, 37 Pac. Rep. 640.
See "Obligations of Owner," §§ 523 et seq., ante.

[42] Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394.

[43] Blyth v. Robinson, 104 Cal. 239, 242, 37 Pac. Rep. 904; Blyth v. Torre (Cal., Dec. 14, 1894), 38 Pac. Rep. 639. See Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072; Bragg v. Shain, 49 Cal. 131, 132.
See "Sureties," §§ 605 et seq., ante; "Cross-complaint," §§ 761 et seq., post.

[44] Scammon v. Denio, 72 Cal. 393, 14 Pac. Rep. 98 (amount expended in completing house).
Offsets: Damages for breach of contract by contractor: See Hampton v. Christensen, 148 Cal. 729, 84 Pac. Rep. 200. See §§ 515 et seq., ante.

claim for the expense of keeping the work in repair during the period of one year after completion, in accordance with the terms of the contract, it is not proper to plead, in an answer filed after the period of one year in question had elapsed, that the owner will be required to expend more than a sum specified for that purpose.[45]

Against assignee. Expenditures by the owner for repairs, or damage arising from the failure of the contractor to keep the structure in repair for one year, as agreed in the contract, which accrued at least as early as notice of assignment of the amount due upon the contract, it has been held, cannot be set up as a counterclaim against the assignee, where it appears that the agreement of the owner to pay the contract price in thirty-five days after the completion of the contract is in no manner dependent upon the contractor's engagement to keep the work in repair for one year after such completion; and in such case no right of recoupment or set-off for the expense of future repairs exists in favor of defendant.[46]

Where there is a mere novation of a second contractor, who undertakes the complete performance of the contract for the first original contractor, an assignment to the former of moneys due to the latter would not affect the right of set-off as against the latter.[47]

§ 758. Same. Damages for delay. Section eleven hundred and eighty-four [48] refers to offsets not arising under the terms of the contract, as to which, from an inspection thereof, subclaimants can have no notice, and in a suit by subclaimants the owner is entitled to set off damages because of the delay in the completion of the building, as required

[45] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 66, 67, 40 Pac. Rep. 45. See note 47, infra.

[46] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 66, 67, 40 Pac. Rep. 45. See note 47, infra.

[47] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 66, 67, 40 Pac. Rep. 45.

See, however, right of set-off as against assignee, §§ 515, 516, and §§ 588 et seq., ante, and "Novation," § 333, ante.

[48] **Kerr's Cyc. Code Civ. Proc.**, § 1184.

by the contract; but not as against the final payment under a statutory original contract.[49]

§ 759. Cross-complaint.[50] The facts set forth in a pleading determine whether it is an answer or a cross-complaint; and it is immaterial what the defendant calls his pleading; and, whether he designates it as an answer or a cross-complaint, its character will be determined by the court. So where a mechanic's lien was foreclosed, and the answer of the contractor pleaded his own lien against the property, the court held that it was a cross-complaint.[51]

§ 760. Same. Setting up mechanic's lien in mortgage foreclosure. Upon the foreclosure of a mortgage, where the plaintiff charges that the defendant has or claims some interest in the premises, it is not necessary to set up a mechanic's lien upon the premises paramount to the mortgage, by way of cross-complaint, but it may be done by answer;[52] and in such case no cross-complaint need be served and filed.[53]

[49] Builders' Supply Depot v. O'Connor (Cal., Jan. 10, 1907), 88 Pac. Rep. 982, **following** Hampton v. Christensen, 148 Cal. 729, 84 Pac. Rep. 200.

See §§ 515 et seq., ante.

Montana. Set-off and counterclaim by owner against contractor: See Boucher v. Powers, 29 Mont. 342, 74 Pac. Rep. 942.

[50] **Motion to strike out cross-complaint withdrawn;** on appeal, objections not considered: See Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. Rep. 681.

[51] Holmes v. Richet, 56 Cal. 307, 311, 38 Am. St. Rep. 54.

[52] Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 354. See Miller v. Luco, 80 Cal. 257, 261, 22 Pac. Rep. 195; Bulwer Con. M. Co. v. Standard Con. M. Co., 83 Cal. 589, 599, 23 Pac. Rep. 1102; Mills v. Fletcher, 100 Cal. 142, 149, 34 Pac. Rep. 637.

See "Complaint," §§ 715, 716, ante; "Answer," § 752, ante.

Cross-complaint filed by lien claimant: Whittier v. Fuller, 48 Cal. 175.

Demurrer for misjoinder of causes of action in a cross-complaint: Quale v. Moon, 48 Cal. 478.

Certain breaches of contract set forth in cross-complaint, and damages prayed: Griffith v. Happersberger, 86 Cal. 605, 609, 25 Pac. Rep. 137, 487.

See § 752, ante.

[53] Germania B. & L. Assoc. v. Wagner, 61 Cal. 349, 351.

A claimant made a party may set up his lien by way of cross-complaint:

Colorado. Ford G. Min. Co. v. Langford, 1 Colo. 62 (1864).

Oregon. By way of answer: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454.

§ 761. **Same. Damages.** Where the statutory original contract is void, there can be no cross-complaint for damages for its breach;[54] but damages may be affirmatively recovered by the owner on a cross-complaint against a plaintiff who is a bondsman on the contractor's bond.[55]

§ 762. **Same. Payments.** Where an action is brought in equity to foreclose a material-man's lien for materials contracted for on a certain date, and the cross-complaint of the owner alleges that, "to avoid threatened litigation," he paid to plaintiffs, at an earlier date, a sum of money in excess of what was then due them for materials before that time furnished, and prays judgment for such sum, the cause of action set up in the cross-complaint does not relate to nor depend upon the contract or transactions upon which the plaintiffs' action was brought, nor does it affect the property to which the plaintiffs' action relates. Such cross-complaint is not authorized by section four hundred and forty-two,[56] and is properly demurrable. The same matters, if set up in a counterclaim, are properly cognizable under that pleading.[57]

§ 763. **Supplemental answer. Decree of foreclosure of mortgage.** The decree of foreclosure of a mortgage in favor of a defendant in a mechanic's-lien foreclosure suit may be set up upon a retrial of the latter action by way of supplemental answer, if made during the pendency of the same, and the question as to its effect tried and determined.[58]

[54] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 396, 30 Pac. Rep. 564.

See §§ 515 et seq., and §§ 319 et seq., ante.

[55] Blyth v. Torre (Cal., Dec. 14, 1894), 38 Pac. Rep. 639.

See "Sureties," §§ 605 et seq., ante.

[56] **Kerr's Cyc. Code Civ. Proc.,** § 442.

[57] Clark v. Taylor, 91 Cal. 552, 554, 27 Pac. Rep. 860.

[58] Bewick v. Muir, 83 Cal. 373, 23 Pac. Rep. 390.

Oklahoma. A supplemental petition should be filed for amounts becoming due after suit brought: El Reno E. L. & T. Co. v. Jennison, 5 Okl. 759, 50 Pac. Rep. 144.

Washington. Supplemental pleadings must be filed by assignee pendente lite, who is substituted as a party plaintiff, after service on the defendant, who defaults before judgment can be rendered in favor of substituted plaintiff: Powell v. Nolan, 27 Wash. 318, 68 Pac. Rep. 389, 67 Id. 712.

CHAPTER XXXVIII.

EVIDENCE.

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§ 834. Same. Other evidence of value.

§ 764. Scope of chapter.[1] No special reference is made in the chapter on mechanics' liens [2] to part four of the Code

[1] See general plan of treatment. § 670, ante.

Release of owner admissible against assignee: See §§ 634 et seq., ante.

[2] **Kerr's Cyc. Code Civ. Proc., §§ 1183-1203a.**

of Civil Procedure relating to evidence,[3] nor is there any mention of the former in the latter. It is assumed that the provisions of the title on evidence are applicable, except so far as modified by the chapter on mechanics' liens. It is intended here to consider only the rules peculiar to mechanics' liens, prefacing the same with a few general principles found in the cases under discussion.

§ 765. General rule as to exclusion of evidence. If facts essential to support the cause of action be not alleged, evidence upon such omitted facts cannot be heard or considered;[4] but where a question is put and answered as to an issue admitted by the answer, omitting to deny the averment of the complaint, for instance, as to the ownership of the fee, and the defendant is not injured thereby, the error,

[3] **Kerr's Cyc. Code Civ. Proc.,** §§ 1823-2104. And consult voluminous notes to these sections for authorities on the general subject of evidence.

Immaterial evidence as to partnership: See Bradbury v. McHenry, 125 Cal. xix, 57 Pac. Rep. 999.

Evidence of partial tender of performance on one day and tender of other part on another day: See Schroeder v. Pissis, 128 Cal. 209, 213, 60 Pac. Rep. 758.

Evidence of non-liability of tenant not admissible to show liability of owner: Bradbury v. McHenry, 125 Cal. xix, 57 Pac. Rep. 999.

Colorado. The right of a material-man to hold a lien must be maintained by proof bringing it directly within the statute: Groth v. Stahl, 3 Colo. App. 8, 30 Pac. Rep. 1051.

Oregon. Evidence of assignment of contract prohibited by U. S. Rev. Stats., § 3737 (U. S. Comp. Stats. 1901, p. 2507, 6 Fed. Stats. Ann. 123); and evidence as to payment: See North Pac. L. Co. v. Spore, 44 Oreg. 462, 75 Pac. Rep. 890.

Utah. Discovery allowed in an action for accounting and to foreclose lien: See Utah C. Co. v. Montana P. & P. Co., 147 Fed. Rep. 981.

Washington. Intention to assert a lien absent; held, evidence must be clear as to facts establishing lien: Knudson-Jacob Co. v. Brandt (Wash., Sept. 25, 1906), 87 Pac. Rep. 43 (doubtful law).

City charter admissible in evidence: See City of Seattle v. Turner, 29 Wash. 515, 69 Pac. Rep. 1083.

[4] Hicks v. Murray, 43 Cal. 515, 522; Ellis v. Rademacher, 125 Cal. 556, 558, 58 Pac. Rep. 178.

Facts not alleged in pleadings disregarded on appeal: See Burnett v. Stearns, 33 Cal. 468; Gregory v. Nelson, 41 Cal. 278; Bradbury v. Cronise, 46 Cal. 287; Estate of McKinley, 49 Cal. 152; McDonald v. Mission View H. Assoc., 51 Cal. 210; Hill v. Den, 54 Cal. 6, 20; Tracy v. Craig, 55 Cal. 91; Silvey v. Neary, 59 Cal. 97; Campe v. Lassen, 67 Cal. 139, 7 Pac. Rep. 430; Ortega v. Cordero, 88 Cal. 221, 226, 26 Pac. Rep. 80.

Neither stipulation nor admission can remedy the defect: Tucker v. Parks, 7 Colo. 62, 68, 1 Pac. Rep. 427.

being harmless, is not ground for reversal.[5] At the trial the defendant cannot controvert a fact not in issue, which is deemed to be admitted by the pleadings.[6] So by a failure to deny that labor was done on a mining claim, as averred in the complaint, such allegation is deemed admitted, and the fact cannot be controverted on the trial.[7]

§ 766. **Admissions.** The default of the contractor in an action of a subclaimant to enforce a lien is an admission that the money is due from the contractor to the subclaimant.[8]

Misrepresentations of the owner as to the actual completion of the building is admissible in evidence, where such owner fails to file a notice of completion, as required by the statute, either on the theory of an admission or estoppel.[9]

An admission in the pleadings is sufficient to support a finding.[10]

[5] West Coast L. Co. v. Newkirk, 80 Cal. 275, 280, 22 Pac. Rep. 231.

[6] Bradbury v. Cronise, 46 Cal. 287, 288; Schmid v. Busch, 97 Cal. 184, 187, 31 Pac. Rep. 893; Brunner v. Marks, 98 Cal. 374, 376, 33 Pac. Rep. 265. See Eaton v. Rocca, 75 Cal. 93, 97, 16 Pac. Rep. 529; Goss v. Helbing, 77 Cal. 190, 191, 19 Pac. Rep. 277.

[7] Bradbury v. Cronise, 46 Cal. 287, 288.

[8] De Camp L. Co. v. Tolhurst, 99 Cal. 631, 635, 34 Pac. Rep. 438.

Idaho. See Lowe v. Turner, 1 Idaho 112.

Utah. Evidence of conversations with president and manager of corporation as to wages: See Sandberg v. Victor G. & S. Min. Co., 24 Utah 1, 66 Pac. Rep. 360, 363.

Evidence as to adjustment of wages: See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360, 365.

[9] Hubbard v. Lee (Cal. App., Oct. 11, 1907), 92 Pac. Rep. 744.

See § 546, ante.

Admission as to correctness of survey: See Scanlan v. San Francisco & S. J. V. R. Co. (Cal., Dec. 23, 1898), 55 Pac. Rep. 694.

[10] West Coast L. Co. v. Apfield, 86 Cal. 335, 342, 24 Pac. Rep. 993.

See "Complaint," §§ 620 et seq., ante.

Failure to object to evidence supporting findings in conflict with answer: See Schroeder v. Pissis, 128 Cal. 209, 212, 60 Pac. Rep. 758.

Evidence held insufficient: California I. C. Co. v. Bradbury, 138 Cal. 328, 71 Pac. Rep. 346, 617 (changes and extra work, excessive).

Evidence held sufficient to support verdict or finding: Hale Bros. v. Milliken (Cal. App., May 3, 1907), 90 Pac. Rep. 365 (damages for delay in delivery).

Colorado. Everett v. Hart, 20 Colo. App. 93, 77 Pac. Rep. 254 (declarations against interest by lease-holder of mine).

Oklahoma. See Harness v. McKee-Brown L. Co. (Okl., Feb. 13, 1907), 89 Pac. Rep. 1020 (construction and use of lumber).

Oregon. Cline v. Shell, 43 Oreg. 372, 73 Pac. Rep. 12 (reasonable value of goods; all goods charged).

§ 767. **Attorneys' fees.** No evidence need be produced or appear in the record as to the value of attorneys' fees, when properly allowed by the statute; nor is the court bound by testimony touching its value, though such evidence is admissible, and may properly be considered by the court, the only regulation being that it shall not abuse the discretion committed to it by the statute.[11]

§ 768. **Description of property.** Evidence may be received for the purpose of determining the sufficiency of the description of the property; and such evidence will include the purpose for which the description is required and the persons who are to be affected by it.[12]

Field-notes made by a surveyor, he not being present at the trial to testify to their correctness, and, no competent evidence of their correctness being given, may be excluded.[13]

§ 769. **Extent of land for convenient use and occupation.** Under certain circumstances, elsewhere more fully considered, evidence as to the extent of land necessary for the convenient use and occupation of the premises, upon proper allegations in the pleadings, should be given.[14]

Washington. Cochran v. Yoho, 34 Wash. 238, 75 Pac. Rep. 815 (forcibly ejecting contractor from work); Huetter v. Redhead, 31 Wash. 320, 71 Pac. Rep. 1016 (amount due). See Beebe v. Redward, 35 Wash. 615, 77 Pac. Rep. 1052 (extras); Lang v. Crescent C. Co. (Wash., Nov. 1, 1907), 87 Pac. Rep. 261 (satisfaction of superintendent); Knudson-Jacob Co. v. Brandt (Wash., Sept. 25, 1906), 87 Pac. Rep. 43 (amount chargeable to structure; actual delivery of material); Lee v. Kimball (Wash., March 12, 1907), 88 Pac. Rep. 1121 (upon appeal; land necessary for well); Seattle L. Co. v. Sweeney (Wash., June 19, 1906), 85 Pac. Rep. 677 (use of materials in building).

[11] Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394.

New Mexico. Value of attorneys' fees found without evidence: See Pearce v. Albright, 12 N. M. 202, 76 Pac. Rep. 286.

[12] Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1079.

See §§ 399 et seq., ante; but see § 768, post.

Oregon. Evidence as to property involved, there being no issue in the pleadings; certified copies of mining journals: See Lewis v. Beeman, 46 Oreg. 311, 80 Pac. Rep. 417.

[13] Scanlan v. San Francisco & S. J. V. R. Co., 128 Cal. 586, 588, 61 Pac. Rep. 271.

[14] Green v. Chandler, 54 Cal. 626, 627; Willamette S. M. Co. v. Kremer, 94 Cal. 205, 211, 29 Pac. Rep. 633.

See "Extent of Lien," §§ 438 et seq., ante; "Pleading," §§ 710, 717 et seq., ante.

§ 770. **Books of account.** Testimony introduced by the plaintiff to show the mode in which the plaintiff's books of account were kept, and that they were correct, is properly admitted in evidence, in an action to foreclose the lien of a material-man.[15]

§ 771. **Claimant as witness against estate.** The claimant of a mechanic's lien against a building erected by a deceased person is a competent witness to testify to facts occurring before the death of the owner, in an action to foreclose the lien, against the representative of his estate.[16]

§ 772. **Fixtures. Intention of parties.** Evidence of a tenant's intention in reference to the future removal of a building erected by him upon leased premises is inadmissible in an action to foreclose the lien of a material-man upon the land and building. Although, as between the landlord and his lessee, the question of whether a building about to be erected would become a part of the realty or not would depend largely upon the intention of the parties, yet it would not depend upon the intention of one of the parties; nor would a secret intention on the part of both defeat the rights of third parties, who acted without notice of such intention, and upon the faith of the rule established by law, where no such intention existed.[17]

§ 773. **Judicial notice.** The courts will take judicial notice of certain things, among which are the true signifi-

[15] West Coast L. Co. v. Newkirk, 80 Cal. 275, 280, 22 Pac. Rep. 231.

Hawaii. Entries in books of charges against contractor alone some evidence that they were furnished on his credit, but is not prima facie evidence that his credit was relied upon to the exclusion of the security of the building: Hackfeld v. Hilo R. Co., 14 Hawn. 448, 453.

[16] As the lien is not a "claim" against the estate, within the meaning of § 1880, subd. 3, of the Code of Civil Procedure: Booth v. Pendola, 88 Cal. 36, 43, 23 Pac. Rep. 200, 24 Id. 714, 25 Id. 1101.

[17] West Coast L. Co. v. Newkirk, 80 Cal. 275, 22 Pac. Rep. 231.

See §§ 185 et seq., ante.

Evidence as to permanency of fixture, and intent of owner in relation to its use, admissible: See Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

Oklahoma. Presumption that building is fixture to land: See Bridges v. Thomas, 8 Okl. 620, 58 Pac. Rep. 955.

cance of all English words and phrases, and of all legal expressions.[18] Thus —

Mining instrumentalities. "Shafts," "tunnels," "levels," "chutes," "stopes," "uprises," "crosscuts," "inclines," and the like, when applied to mines, are words, of the meaning of which courts will take judicial notice.[19]

Computations. Courts will take judicial notice of the laws of nature, and hence of the rules of mensuration, by which the cubic contents of an irregular body can be computed.[20]

Incorporation of city. The court will take judicial notice of the incorporation of a city, and hence will take such notice that San Diego is an incorporated city, for the purpose of enforcing a lien for street-work, etc., under the provisions of section eleven hundred and ninety-one,[21] without an allegation in the complaint to that effect.[22]

§ 774. **Parol evidence. Assignment.** Parol evidence may be admitted to show the object and purpose of an assignment. By explaining all the facts and circumstances surrounding the transaction, the instrument is not varied by parol evidence.[23]

[18] Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

[19] Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401.

[20] Scanlan v. San Francisco & S. J. V. R. Co. (Cal., Dec. 23, 1898), 55 Pac. Rep. 694.

See **Kerr's Cyc. Code Civ. Proc.**, § 1875, subd. 8, and note.

Evidence of shrinkage of embankment: See Scanlan v. San Francisco & S. J. V. R. Co., 128 Cal. 586, 61 Pac. Rep. 271.

Computations accepted as sufficiently accurate: See Scanlan v. San Francisco & S. J. V. R. Co., 128 Cal. 586, 61 Pac. Rep. 271.

[21] **Kerr's Cyc. Code Civ. Proc.**, § 1191.

[22] Bryan v. Abbott, 131 Cal. 222, 63 Pac. Rep. 363.

See **Kerr's Cyc. Code Civ. Proc.**, § 1875, and note.

[23] Renton v. Monnier, 77 Cal. 449, 19 Pac. Rep. 820.

As to parol evidence, see note 15 Am. St. Rep. 714.

Parol evidence admissible to show that supposed principal on bond is surety: See National B. of C. v. Schirm, 3 Cal. App. 696, 86 Pac. Rep. 981.

Montana. Oral evidence that payments should be made according to custom, not admissible to vary terms of express written contract: Riddell v. Peck-Williamson H. & V. Co., 27 Mont. 44, 69 Pac. Rep. 241.

Washington. As to check, see Megrath v. Gilmore, 10 Wash. 339, 39 Pac. Rep. 131. Where a defendant holds under written lease the premises upon which a lien is claimed, his interest therein cannot be shown by parol testimony: Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. Rep. 458.

§ 775. **Same. Parol evidence to explain meaning of words.** Parol evidence of surrounding circumstances may be given to aid in the proper interpretation of an instrument; but where the parties have themselves used words which require no interpretation, where the words are sufficiently clear and understood, there is no occasion for aid to their proper interpretation or meaning, and parol evidence is not admissible therefor.[24]

Gross ton. Thus where a contract contains the expression "gross ton," parol evidence may be admitted to explain it, and to prove that it is often used in lieu of the phrase "long ton," which indicates a ton of two thousand two hundred and forty pounds, and that the statutory ton, consisting of two thousand pounds, was not intended.[25]

§ 776. **Notice. Probate proceedings.** Probate proceedings in another county than the one in which a mine is situated affords no notice to lien claimants as to the status of the title of the property; but a contract to work a mine belonging to the estate, signed by the executor as such, if known to the laborers under the contractor, is held to be notice of all that it contains.[26]

§ 777. **Questions assuming matter in dispute.** Questions assuming the matter in dispute are objectionable. Thus an

[24] Shaver v. Murdock, 36 Cal. 293, 297; but see Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637.

Colorado. Parol evidence not admissible to explain contract, when terms are clear: See Flick v. Hahn's Peak & E. R. Co., 16 Colo. App. 485, 66 Pac. Rep. 453, 455.

[25] Higgins v. California P. & A. Co., 120 Cal. 629, 52 Pac. Rep. 1080; but see s. c. 109 Cal. 304, 41 Pac. Rep. 1087 (under **Kerr's Cyc. Code Civ. Proc.**, § 1861).

Evidence of custom as to weight of structural steel; "gross ton"; "long ton": Hale Bros. v. Milliken (Cal. App., May 31, 1907), 90 Pac. Rep. 365, 369.

Colorado. Parol evidence admissible to explain doubtful meaning of "heart of yellow pine," in contract, circumstances surrounding execution of same, and conversations leading up to same: San Miguel Consol. G. M. Co. v. Stubbs (Colo., April 1, 1907), 90 Pac. Rep. 842, 844.

Oregon. Evidence of usage to explain expression "straight cut and fill": See Aldrich v. Columbia S. R. Co., 39 Oreg. 263, 64 Pac. Rep. 455.

[26] Chappius v. Blankman, 128 Cal. 362, 364, 60 Pac. Rep. 925. See San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 224, 66 Pac. Rep. 255.

objection is properly sustained to the question, "I will ask you, if with the money you paid and five hundred dollars damages, whether the whole amount of the contract work and the extra work was paid?" — as the question assumed five hundred dollars damages, a matter in dispute.[27]

§ 778. **Receipt.** A receipt is prima facie evidence of the facts recited in it, but is not conclusive, and a receipt acknowledging payment of a debt, whether in money or some other medium, may be explained or contradicted by parol. It is, however, evidence of a very high order, which should prevail, unless it is overcome by clear and satisfactory evidence.[28] Thus —

Payment by note. The receipt of a material-man, expressly stating receipt of "payment by note," is prima facie, although not conclusive, evidence of the facts recited; and it may well be contended that this is something more than a mere receipt which may be contradicted by parol evidence, to wit, that it is an agreement in writing to accept the note as payment.[29]

§ 779. **Agency.**[30] Agency may not generally be established by the declarations and acts of the alleged agent; but, under proper circumstances, the declarations and acts of an agent might be sufficient to establish ostensible agency, by reason of the failure of the owner to exercise ordinary care.[31]

§ 780. **Same. Special statutory provision.**[32] **Presumption.** But, under the provisions of the California mechanic's-

[27] Barilari v. Ferrea, 59 Cal. 1, 4.

[28] Jenne v. Burger, 120 Cal. 444, 446, 52 Pac. Rep. 706.

[29] Jenne v. Burger, 120 Cal. 444, 446, 52 Pac. Rep. 706.

[30] **Improper evidence of agency admitted;** on appeal, great weight attached to other evidence improperly admitted: See Williams v. Hawley, 144 Cal. 97, 102, 77 Pac. Rep. 763.

See §§ 572 et seq., ante.

Montana. The law presumes that every member of a mining firm has authority to hire laborers and make the firm liable for their wages, if they are necessarily employed in working upon the joint property; and no evidence of such authority is required: Nolan v. Lovelock, 1 Mont. 224.

[31] **Kerr's Cyc. Civ. Code,** § 2317, and note.

[32] See "Agency," §§ 572 et seq., ante.

lien law, evidence of these acts and declarations is permitted to establish, prima facie, such agency. Section eleven hundred and eighty-three,[33] as amended in 1903, gives to a miner, for instance, a lien for labor done at the instance of the owner of the building or his agent, "and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or work or labor performed in and about such mining claim or claims, or real property worked as a mine, or the construction, alteration, addition to, or repair, either in whole or in part of any building or other improvement as aforesaid, or of such mining claim or claims, either as lessee or under a working bond or contract thereon, with the privilege of purchase, or otherwise, shall be held to be the agent of the owner for the purposes of this chapter."

Where a foreign corporation owns mines in this state, and, in its name, work is commenced, and its so-called superintendent buys costly machinery, constructs a mill, extracts and reduces ores, employs miners, material-men, and laborers, takes up water rights and mineral claims, enters into contracts, borrows money, acknowledges service of process in a civil action to collect this money, and, in general, by word and act, holds himself out and conducts himself as the duly and regularly appointed superintendent of the company, these open declarations, and continued acts of the superintendent and foreman, were admissible in evidence, under this section, to show the person in charge of the mining.[34]

§ 781. Same. Overcoming presumption. Knowledge. By the rule of evidence declared by section eleven hundred and eighty-three,[35] the showing referred to in the preceding section, if not disputed or overcome, prima facie establishes the agency; but the owner or other person in interest may overcome this by proving his want of knowledge and non-

[33] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

[34] Donohoe v. Trinity Consol. G. & S. M. Co., 113 Cal. 119, 123, 45 Pac. Rep. 259.

[35] **Kerr's Cyc. Code Civ. Proc.**, § 1183.

employment of the alleged agent, coupled with a showing that he had exercised ordinary care in the premises.[36]

§ 782. **Same. Knowledge of lack of agency.** The presumption of agency raised by section eleven hundred and eighty-three [37] may be rebutted by showing that the claimant worked with knowledge that the person in charge of the mining did not own the property, and did not work the mine as the owner's representative,[38] and therefore he is not entitled to a lien thereon, on any theory of the agency of such person.

§ 783. **Same. Knowledge that employer incurred indebtedness on his own account.** Evidence is also admissible to show the knowledge of claimant that the employer was in possession under a contract to make improvements and prosecute development-work on a mine, and prospect at his own cost and expense, and that he was to keep the property free from liens; the purpose being to show that the claimant was employed by the person in possession on his own account, and not in any manner as the agent of the owner.[39]

[36] Donohoe v. Trinity Consol. G. & S. M. Co., 113 Cal. 119, 123, 45 Pac. Rep. 259. In this case no one sought to overcome the prima facie case. No direct authorization or direct ratification of the acts of the alleged superintendent were put in evidence.

See "Agency," §§ 572 et seq., ante; "Estoppel," §§ 469 et seq., ante; "Due Process of Law," §§ 31 et seq., ante.

Montana. Partner: See Nolan v. Lovelock, 1 Mont. 224.

Oregon. Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454. See Sellwood L. & Mfg. Co. v. Monnell, 26 Oreg. 267, 38 Pac. Rep. 66.

[37] **Kerr's Cyc. Code Civ. Proc.,** § 1183.

[38] Jurgenson v. Diller, 114 Cal. 491, 492, 46 Pac. Rep. 610, 55 Am. St. Rep. 83 (decided before the amendment of 1903).

See "Agency," §§ 572 et seq., ante; "Estoppel," §§ 469 et seq., ante; "Due Process of Law," §§ 31 et seq., ante.

[39] Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 291, 65 Pac. Rep. 578 (a series of questions, set forth in opinion, held to be competent).

But see §§ 572 et seq., and §§ 469 et seq., ante.

Certain evidence admissible under stipulation that the father was the agent of the owner in the matter: See Linck v. Johnson, 134 Cal. xix, 66 Pac. Rep. 674.

Montana. Declarations of agent as to account, hearsay as to owner: See Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 991.

Washington. Evidence that architect was agent, actual or statutory, for the purchase of materials: See Seattle L. Co. v. Sweeney, 43 Wash. 1, 85 Pac. Rep. 677.

§ 784. Same. Proof of knowledge of owner. Under section eleven hundred and eighty-three, as it stood at the time, a contract to sell a mining claim, which permitted the vendee to work the same and extract ores therefrom, could not be received in evidence against the owner, where the vendee did no work at all upon the mine, and the only purpose was to show that a mere watchman was hired by the vendee as constructive agent of the owner, the services of the watchman and the acts of the vendee not being within the purview of the statute as to the creation of such agency.[40]

§ 785. Burden of proof.[41] Generally. The burden is on the claimant to show that the person causing the improvement was the express or statutory agent of the owner.[42]

Memorandum of settlement made by wife, acting for the community, after the completion of the structure, admissible to show the balance due: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 718.

[40] Williams v. Hawley, 144 Cal. 97, 103, 77 Pac. Rep. 762.

See §§ 572 et seq., ante.

[41] In action against owner for failure to file contractor's bond, burden of proof: See Gibbs v. Tally, 63 Pac. Rep. 168, s. c. reversed, 133 Cal. 373, 65 Pac. Rep. 970.

See "Agency," §§ 572 et seq., ante.

As to validity of demands and regularity of liens, see §§ 452 et seq., ante.

As to other interests, see §§ 715 et seq., ante.

As to giving notice of non-responsibility, see Hines v. Miller, 122 Cal. 517, 55 Pac. Rep. 401; and §§ 469 et seq., ante.

Material-man. Proof that amount due exceeded amount paid. Under **Kerr's Cyc. Code Civ. Proc.,** § 1200, a material-man, seeking to enforce a lien for materials furnished a contractor, who abandoned the work, held required to prove that the value of the work and materials furnished exceeded the amount due and paid to the contractor: McCue v. Jackman (Cal. App., March 16, 1908), 95 Pac. Rep. 673.

Oregon. Burden on claimants to show, as against the owner, that no payments were made by owner's lessee: See Lewis v. Beeman, 46 Oreg. 311, 80 Pac. Rep. 417.

Washington. Burden of proof; novation: See Kruegel v. Kitchen, 33 Wash. 214, 74 Pac. Rep. 373.

As to burden on claimant to show building was on lot described, and that all lots were necessary for convenient use and occupation, see Peterman v. Milwaukee B. Co., 11 Wash. 199, 202, 39 Pac. Rep. 452.

Burden of proof on claim of title to materials: See Potvin v. Denny H. Co., 37 Wash. 323, 79 Pac. Rep. 940, s. c. 26 Wash. 309, 66 Pac. Rep. 376.

[42] Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 287, 65 Pac. Rep. 578.

See §§ 572 et seq., ante.

Montana. Burden on plaintiff to show authority of agent of corporation, or ratification of his acts by the corporation: See Wagner v. St. Peter's Hospital, 32 Mont. 206, 79 Pac. Rep. 1054.

Breach of agreement. The burden of proof is on the party setting up a breach of an agreement.[43]

Validity of claims of sublienors. The burden of proof is on the owner, when he makes payments to subclaimants, to show that the claims of lien are valid.[44]

§ 786. **Same. Priorities.** Where the complaint for the foreclosure of a lien alleged that the other defendants, who alone answered, had a mortgage on the building and the land on which it was situated, and that such mortgage was subordinate and subject to the liens of the plaintiff, and the defendants denied this latter allegation, but introduced no evidence showing the priority of their mortgage, it was held that the burden of showing such priority was on the defendants, and that the court was justified in finding that their lien was subordinate and subject to that of plaintiffs; the court saying, " If the defendants, in their answer to that allegation, had stated facts which showed that their claim was not subordinate or subject to the liens of the plaintiffs, they would have had the affirmative of the issue. And it was their ' business, when thus called upon, to disclose ' the nature of their claim.[45] . . . By not doing so, they certainly occupy no better position than they would if they had done so. Conceding that the denial of the defendants raised an issue, we think it was one of which they had the affirmative." [46]

[43] Bancroft v. San Francisco T. Co., 120 Cal. 228, 234, 52 Pac. Rep. 496.

[44] Wilson v. Nugent, 125 Cal. 280, 289, 57 Pac. Rep. 1008.

See §§ 514, 525 et seq., ante.

Montana. The burden of proof is on claimant to establish his lien: Missoula M. Co. v. O'Donnell, 24 Mont. 65, 60 Pac. Rep. 594, 991.

Utah. In McCornick v. Saddler, 10 Utah 210, 37 Pac. Rep. 332, it was held that the burden was on the plaintiff, the assignee of the contractor, in an action for the balance of the contract price, after the payment of liens had been made, as agreed between plaintiff and defendant, to show that the claim of a material-man paid by the defendant owner was not a lien upon the property of the defendant, as alleged in his answer (Minor, J., dissenting).

Burden of proof on lien claimant; and his books should be properly kept, so that one can clearly ascertain the amount chargeable to the particular property: Knudson-Jacob Co. v. Brandt (Wash., Sept. 25, 1906), 87 Pac. Rep. 43 (but this latter proposition goes rather to the weight of the evidence).

[45] Citing Anthony v. Nye, 30 Cal. 401.

[46] Harmon v. Ashmead, 68 Cal. 321, 323, 9 Pac. Rep. 183.

See " Pleading," §§ 715, 716, ante; " Answer," §§ 738 et seq., ante.

§ 787. Same. Time of filing claim of lien. In an action to foreclose the lien of the original contractor's subclaimant, the burden of proof was held to be on the plaintiff to show the completion of the building within the statutory time, or thirty days prior to the filing of the claim of lien.[47]

§ 788. Same. Cessation from work. Where the work on a building ceased at a prior time for thirty days before another and subsequent cessation of work, in attacking a lien under section eleven hundred and eighty-seven, as it stood at the time, the owner had the burden of showing, not that there might possibly have been such earlier stoppage of work for thirty days, but that it actually happened.[48]

§ 789. Certificate as evidence.[49] A written certificate for the completion payment, duly signed by the architect, placed

Colorado. The onus is on the lien claimant to establish his right of priority under the statute: Mellor v. Valentine, 3 Colo. 260; also, that the person he contracted with was the owner: Rico R. & M. Co. v. Musgrave, 14 Colo. 79, 23 Pac. Rep. 458 (1883).

[47] Schallert-Ganahl L. Co. v. Sheldon (Cal., Feb. 9, 1893), 32 Pac. Rep. 235. The same rule would seem to be applicable to show that the claim was filed within ninety days, or within thirty days after the filing of the owner's notice of completion, since the amendment of 1897 to § 1187 of the Code of Civil Procedure.

See "Performance," §§ 334 et seq., ante; "Notice," §§ 425 et seq., ante.

Colorado. Burden of proof on claimant; time of last work: Stidger v. McPhee, 15 Colo. App. 252, 62 Pac. Rep. 332.

Montana. "The commencement of the work must be shown; for from that date the lien attaches, if at all. The character of the work must be shown; for it is not for all kinds of work that a lien is allowed. The completion of the work must be shown; for notice of claiming a lien must be filed in the recorder's office within sixty days from that time. This proof must be furnished by the party who asserts the existence of the lien": Davis v. Alvord, 94 U. S. 545, 547, bk. 24 L. ed. 283.

[48] Marble L. Co. v. Lordsburg H. Co., 96 Cal. 332, 336, 31 Pac. Rep. 164.

See "Cessation," §§ 354 et seq., ante.

Oregon. The burden is on the owner to allege and prove that some of the material, if the accurate amount thereof was capable of computation in advance, or if not, that an unnecessary quantity thereof remained unused after the building was fully completed, or that, without his consent, it had been removed from the building site: Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192. See Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54.

[49] See "Certificates in Contract," §§ 239 et seq., ante.

Colorado. Stipulation between lien-holders, fixing amounts due, and reciting that subcontractors had liens, admissible: Charles v. Hallack L. Co., 22 Colo. 283, 43 Pac. Rep. 548.

Washington. See Brown v. Winehill, 3 Wash. 524, 28 Pac. Rep. 1037.

in evidence, is some substantial evidence that the architect was satisfied with the building, and, if followed by the owner going into possession of the structure, is evidence of the acceptance thereof on the part of the owner, as well as the architect.[50]

Where the architect makes oral declarations, whether before or after giving such certificate, that he was not satisfied with the building, the statements can hardly be taken by the trial judge as impeaching such certificate.[51]

§ 790. Same. Conclusiveness of certificate. The certificate of the architect is conclusive of the rights of the parties under the original contract, as to payments based upon such certificate, unless it can be shown that it was obtained by the owner by collusion, fraud, or mistake, when, under the contract, it is the duty of the architect to certify that such payments are due.[52]

[50] Wyman v. Hooker, 2 Cal. App. 36, 39, 83 Pac. Rep. 79.

Resolution of board of supervisors, reciting that work had been done to satisfaction of superintendent of streets, competent evidence of such satisfaction, as required by contract: Thomason v. Richards, 135 Cal. xx, 67 Pac. Rep. 1056.

Evidence as to digging up and disturbing street, permission being granted under ordinance: See Flinn v. Mowry, 131 Cal. 481, 488, 63 Pac. Rep. 724, 1006.

Montana. Testimony as to estimates inadmissible: See Cook v. Gallatin R. Co., 28 Mont. 320, 72 Pac. Rep. 678.

Impeaching witness as to estimate of work by statements as to erroneousness thereof: See Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678.

Oregon. Evidence of refusal of architect to give final certificate at instance of owner: See Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126.

Washington. Evidence of approval of building-inspector of work, contrary to law and contrary to contract, excluded: See Ekstrand v. Barth, 41 Wash. 321, 83 Pac. Rep. 305.

[51] Wyman v. Hooker, 2 Cal. App. 36, 39, 83 Pac. Rep. 79.

[52] Dingley v. Greene, 54 Cal. 333, 337.

Conclusiveness of certificate as to work being done according to contract; question raised, but not decided, in Donnelly v. Adams, 115 Cal. 129, 132, 46 Pac. Rep. 916.

See "Terms of Contract," §§ 239 et seq., ante.

Conclusiveness of engineer's estimate for additional earth, under contract for embankment, up to limit specified in contract: See Scanlan v. San Francisco & S. J. V. R. Co. (Cal., Dec. 23, 1898), 55 Pac. Rep. 694.

Idaho. Final certificate or estimate of architect not conclusive under contract: See Huber v. St. Joseph's Hospital, 11 Idaho 631, 83 Pac. Rep. 768.

§ 791. **Same. Certificate as evidence of time of completion of building.** Where the contract provides that the architect, before the last payment is made, shall show a certificate for the purpose of indicating when the final instalment is payable, the date of the certificate is not evidence of the time of the completion of the building.[53] Where the contract provides for certificates of the architect for payments under the contract, a certificate that "the building is now finished as per contract," and that the contractor is entitled to the last payment, is not evidence of the time of the completion of the building.[54]

With reference to this subject, the court has said:[55] "The contract provided, among other things, that the work should be done 'to the satisfaction of the superintendent of public streets of said city and county,' and appellant offered in evidence a certificate of the superintendent, by a deputy, that the work 'has been done to my satisfaction.' Respondent objected, on several grounds, to the admission of this certificate in evidence, and the objection was sustained. Appellant contends that this ruling was erroneous, and that as the lien was filed within sixty days after the date of said certificate, therefore it was filed in time. But this contention cannot be maintained. Assuming that, as evidence of the work having been done to the satisfaction of the superintendent, as provided in the contract, the certificate or written declaration of the superintendent was admissible,

Washington. Architect's certificate only prima facie evidence, unless made conclusive by contract: Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301.

Proof that architect's certificate was given without sufficient investigation: See Gritman v. United States F. & G. Co., 41 Wash. 77, 83 Pac. Rep. 6.

Certificate of chief engineer of railroad, under contract making it conclusive, held to be conclusive, although not following the language of contract: See Eastham v. Western C. Co., 36 Wash. 7, 77 Pac. Rep. 1051.

[53] Washburn v. Kahler, 97 Cal. 58, 61, 31 Pac. Rep. 741. And see McLaughlin v. Perkins, 102 Cal. 502, 505, 36 Pac. Rep. 839.

See "Contract," §§ 239 et seq., ante.

[54] Washburn v. Kahler, 97 Cal. 58, 61, 31 Pac. Rep. 741. See Beatty v. Mills, 113 Cal. 312, 313, 45 Pac. Rep. 468.

See "Certificates," §§ 239 et seq., and §§ 789 et seq., ante.

Washington. Washington B. Co. v. L. & R. Imp. Co., 12 Wash. 272, 40 Pac. Rep. 982.

[55] Beatty v. Mills, 113 Cal. 312, 45 Pac. Rep. 468.

and not mere hearsay, and assuming further, that, for the purposes of the contract, a certificate of a deputy was a certificate of the superintendent, still such certificate could not change, nor in any way affect, the statutory period within which a lien must be filed. And that period commences at the date of the completion of the work. By the contract the superintendent was arbiter, at most, of only the quality of the work, and his certificate only purports to state that the work which had been done was done well and to his satisfaction. If it had contained a statement of the date of the completion of the work, such statement would have been of no value." [56]

§ 792. **Completion of building.**[57] Whether there was a completion of the building,[58] and the time of completion,[59] are questions of fact for the trial court to determine.

[56] Beatty v. Mills, 113 Cal. 312, 313, 45 Pac. Rep. 468. See Washburn v. Kahler, 97 Cal. 58, 61, 31 Pac. Rep. 741; Warren v. Ferguson, 108 Cal. 535, 41 Pac. Rep. 417.

See "Completion," §§ 792 et seq., post; "Architects," §§ 119 et seq., ante; "Performance," §§ 334 et seq., ante; "Filing Claim," §§ 416 et seq., ante.

Colorado. Evidence of custom of estimates by engineer, in the absence of agreement, admissible: See Bradbury v. Butler, 1 Colo. App. 430, 29 Pac. Rep. 463.

[57] See, generally, "Performance," §§ 354 et seq., ante; "Contract," § 801, post; "Questions of Fact," § 827, post.

Witness allowed to explain, on redirect examination, that a letter fixing time of delay at less than that claimed was written in attempt to effect an amicable settlement: Hale v. Milliken (Cal. App., May 31, 1907), 90 Pac. Rep. 365, 373.

Building to be completed by certain date; harmless error in striking out evidence as to conversations relating to extensions of time: Hale v. Milliken (Cal. App., May 31, 1907), 90 Pac. Rep. 365.

Rejection of evidence as to waiver of provision in contract requiring extension of time to be in writing, error: See Huber v. St. Joseph's Hospital, 11 Idaho 631, 83 Pac. Rep. 768.

Montana. "Mortgagees and others acquiring interests in the property against which such a lien is sought to be enforced have a right, therefore, to call for strict proof of all that is essential to the creation of the lien, and that includes proof of the commencement of the work, of its character, and of its completion: Davis v. Alvord, 94 U. S. 545, 547, bk. 24 L. ed. 283.

[58] Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 334, 31 Pac. Rep. 164.

[59] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 208, 29 Pac. Rep. 633; Coss v. MacDonough, 111 Cal. 662, 666, 44 Pac. Rep. 325; Willamette S. M. Co. v. Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. Rep. 629.

The original contract, even if void, is admissible to determine the character of the building to be erected, and thereby to furnish the test by which it can be known when the building was completed, for the purpose of filing liens.[60]

§ 793. **Same. Statutory evidence.** Under section eleven hundred and ninety-seven,[61] as amended in 1887 and 1897, the occupation and use of a building by the owner, or his acceptance thereof, or cessation of work on any unfinished contract, or building, improvement, or structure, has been held conclusive evidence of the completion, or, by the amendment of 1897, "equivalent to completion," for the purpose of filing subclaimants' claims of lien.[62]

§ 794. **Non-completion of building.** When it is made to appear that it was the original purpose of the owner to erect and construct a building in part only, or that the owner, having proceeded to erect the house in part, abandoned his design in finishing it, the building should be held to be completed, within the meaning of section eleven hundred and eighty-seven,[63] from the time it was so built in part, for the purpose of filing liens.[64]

§ 795. **Claim of lien.**[65] **As evidence of lien.** It has been said that the office of filing the claim is, among other things,

[60] Barker v. Doherty, 97 Cal. 10, 12, 31 Pac. Rep. 1117; Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896.

See "Performance," §§ 334 et seq., ante.

[61] **Kerr's Cyc. Code Civ. Proc.,** § 1197.

[62] See "Filing Claim of Lien," §§ 416 et seq., ante; "Occupation, Use, and Acceptance," §§ 350 et seq., ante; "Cessation," §§ 354 et seq., ante.

"Rule has reference not only to the occupation, use, or acceptance of a dwelling or other house, but to any kind of structure, building, or improvement in which the materials of the lien claimant have been used": Giant P. Co. v. San Diego F. Co., 88 Cal. 20, 23, 25 Pac. Rep. 976; Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896; Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 195, 20 Pac. Rep. 419; Willamette S. M. Co. v. Los Angeles C. Co., 94 Cal. 229, 239, 29 Pac. Rep. 629.

[63] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[64] Schwartz v. Knight, 74 Cal. 432, 434, 16 Pac. Rep. 235.

[65] See, generally, §§ 361 et seq., ante; "Rights of Owner," §§ 510 et seq., ante.

Attorney for contractor failing to file claim of lien for subclaimant; evidence of knowledge as to attorneyship: See Perkins v. West Coast L. Co., 129 Cal. 427, 62 Pac. Rep. 57.

to give notice of the claim, and not to serve as evidence of the lien.[66] But by this language it was evidently not meant that the claim of lien was not admissible in evidence to show that one of the steps in perfecting the lien had been taken.

The recorder's indorsement of filing on the claim of lien is prima facie evidence, at least, of the filing and the date of its record.[67]

[66] Corbett v. Chambers, 109 Cal. 178, 183, 41 Pac. Rep. 873. See "Nature and Object of Claim," §§ 361 et seq., ante; "Notice," §§ 547 et seq., ante.

Colorado. The statement is not even prima facie evidence of the truth of anything which it contains: Mouat L. & I. Co. v. Freeman, 7 Colo. App. 152, 42 Pac. Rep. 1040 (1883, 1889).

Montana. The claim of lien is not evidence against the owner as to the nature of the work or the commencement thereof: Davis v. Alvord, 94 U. S. 545, 547, bk. 24 L. ed. 283.

[67] Silvester v. Coe Quartz M. Co., 80 Cal. 510, 512, 22 Pac. Rep. 217, 218.

Montana. On the trial it is not necessary to prove the filing of the lien before evidence can be offered that the materials entered into the construction of the building: Bardwell v. Anderson, 13 Mont. 87, 32 Pac. Rep. 285. Sundry objections made to account: Id.

Oklahoma. Indorsement on claim of lien of service on owner, held incompetent, but some evidence, if not objected to: See Ryndak v. Seawell, 13 Okl. 737, 76 Pac. Rep. 170.

Washington. See, citing the California case, Garneau v. Port Blakeley M. Co., 8 Wash. 467, 36 Pac. Rep. 463.

Contra: Jewett v. Darlington, 1 Wash. Ter. 601.

It was held, under the logging-lien law (Laws 1893, p. 428), that affirmative proof that the notice was properly indexed in the auditor's office is not essential to recovery thereon: McPherson v. Smith, 14 Wash. 226, 44 Pac. Rep. 255.

Certified copy of the notice and proof of its record are competent evidence: Id.

Auditor's certificate of recording notices, and an additional certificate that they were "as the same appear of record," prove the fact and date of record: Fairhaven L. Co. v. Jordan, 5 Wash. 729, 32 Pac. Rep. 729.

Mere filing indorsement of date and page of record executed by the county auditor was, in an early case, held to be evidence of nothing: Jewett v. Darlington, 1 Wash. Ter. 601 (logger's lien). See also Cowie v. Ahrenstedt, 1 Wash. 416, 418, 25 Pac. Rep. 458.

As to claim duly executed and recorded not proving itself, but only a tentative charge against the property, see Beebe v. Redward, 35 Wash. 615, 77 Pac. Rep. 1052, 1055.

However, a claim of lien, produced by claimant who testified that he filed it, is admissible; there being a certificate of the auditor, under his seal, as to the filing and recording of the instrument: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 719.

Original claim of lien is competent evidence, if its record is also shown by competent evidence (evidence of county auditor, reading from record): Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144.

§ 796. **Same. Objections to contents of claim.**[68] It is no objection to admitting a claim of lien in evidence, that it does not state the name of the reputed owner of the fee.[69]

Name of owner or reputed owner. And a claim of lien which complies with the requirements of the statute as to form, where there is no evidence to contradict its terms, at the time it is offered, may be admitted, when the defendants object to its introduction upon the ground that it does not correctly state the names of either the owner or owners, or reputed owner or owners, of the premises.[70]

Description. It seems that a fatally insufficient description in the claim of lien cannot be helped out by parol evidence.[71]

[68] **Pointing out specific objection as to variance between claim of lien offered and claim pleaded:** See Georges v. Kessler, 131 Cal. 183, 185, 63 Pac. Rep. 466.

Pointing out specific objection as to variance between the contract as set out in the complaint and the claim of lien: See Georges v. Kessler, 131 Cal. 183, 185, 63 Pac. Rep. 466.

Washington. Objections to sufficiency of claim of lien should be raised at the time it is offered. So of objection as to variance between claim and complaint: Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144. See Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099; Price v. Scott, 13 Wash. 574, 43 Pac. Rep. 634; Sweeney v. Pacific C. E. Co., 14 Wash. 562, 45 Pac. Rep. 151.

Under lien law in force, amendments were authorized; hence reason for specific objections to claim upon introduction well founded: See Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144.

[69] West Coast L. Co. v. Newkirk, 80 Cal. 275, 280, 22 Pac. Rep. 231.

See "Names," §§ 379 et seq., ante.

Idaho. Evidence as to name of group of mining claims given in claim of lien, admissible: See Phillips v. Salmon River M. & D. Co., 9 Idaho 149, 72 Pac. Rep. 886.

[70] Kelly v. Lemberger (Cal., Sept. 15, 1896), 46 Pac. Rep. 8.

See "Variances," §§ 835 et seq., post.

Conveyances on record as evidence of reputed ownership: See §§ 379 et seq., ante.

Washington. In Wheeler, O. & Co. v. Ralph, 4 Wash. 617, 30 Pac. Rep. 709, it was held that where the claim is offered in evidence for the purpose of establishing a lien, all questions going to the sufficiency of the notice, if not raised at the time of its offer, will be deemed waived; but it seems that there was also an express waiver of objections to the claim.

[71] Montrose v. Conner, 8 Cal. 344, 347.

See "Description," §§ 399 et seq., ante; but see § 768, ante.

Montana. Goodrich L. Co. v. Davie, 13 Mont. 76, 32 Pac. Rep. 282.

New Mexico. Likewise as to an insufficient verification: Finane v. Las Vegas Hotel Co., 3 N. M. 256, 5 Pac. Rep. 725.

Oregon. The proof must show that the description in the claim is the same as that in the complaint; and where the claim stated that the land was part of a certain lot, fully described in a certain deed re-

§ 797. **Extra work.** In the absence of an allegation in the complaint as to extra work, it has been held that a general statement as to its value and character is insufficient; there should be allegation and evidence in detail as to what the extra work consisted of and the value thereof.[72] Where it is alleged in the complaint that the plaintiff performed extra work for an agreed price of five dollars, as set forth in the claim of lien, and this allegation is not denied by the defendant in his answer, this admission supports the statement in the claim of lien for extra work.[73]

§ 798. **Valid contract.**[74] Where evidence is introduced to show that the architect accepted the building, and that the contract was executed on the part of the plaintiff, and that nothing remained but the payment of the money due, the pleader, under these circumstances, being allowed to set forth his cause of action under the common counts, may

ferred to by date and place of record, and the complaint described the land by metes and bounds as part of the same lot, an issue being raised by the answer that the claim did not describe the land as alleged in the complaint, no lien could be decreed, if the deed was not introduced in evidence: Morehouse v. Collins, 23 Oreg. 138, 31 Pac. Rep. 295.

Utah. Essential averments omitted cannot be supplied by extrinsic evidence: Morrison v. Willard, 17 Utah 306, 53 Pac. Rep. 832, 70 Am. St. Rep. 784.

Washington. See Stetson & P. M. Co. v. McDonald, 5 Wash. 496, 32 Pac. Rep. 108.

[72] Sweeney v. Meyer, 124 Cal. 512, 516, 57 Pac. Rep. 479.

As to extra work, see 1 Am. & Eng. Ann. Cas. 950.

[73] McGinty v. Morgan, 122 Cal. 103, 54 Pac. Rep. 392, 393.

See § 766, ante.

[74] Contract as evidence of value: See § 829, post.

Contract as evidence, upon deviation, abandonment, etc.: See "Complaint. In General,". §§ 672 et seq., ante; "Variances Generally," §§ 835 et seq., post; "Forfeiture and Fraud," §§ 822 et seq., post.

Contract as evidence of completion: See §§ 792 et seq., ante.

Presumption of knowledge of valid contract: See §§ 315 et seq., ante.

Erasures and interlineations. Attempted erasure not an erasure: See Sullivan v. California R. Co., 142 Cal. 201, 204, 205, 75 Pac. Rep. 767.

Party urging rejection of erased portion of contract, and also its reception in evidence: See Sullivan v. California R. Co., 142 Cal. 201, 205, 75 Pac. Rep. 767.

Hawaii. Fraudulent interlineations after execution, rendering contract void: See Apona v. Kamai, 6 Hawn. 707.

Washington. Corrections and interlineations made before contract and specifications executed; the latter admissible: See Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784.

introduce in evidence the special contract, at least if valid, as an admission of the standard of value, or as proof of any other facts necessary to the recovery.[75]

Contract as evidence in action on contractor's bond. In an action on the contractor's bond referring to the contract, it is proper to show what the original contract was; and the building contract referred to in the bond is admissible in evidence for that purpose.[76]

§ 799. Same. Parol modifications of written contract. Where an original contract is entirely superseded by a subsequent parol modification of it, and if it expressly provides for alterations, deviations, additions, and omissions upon request, and for a reasonable rebate from or addition to the price on account thereof, such modification as was in fact made upon request is properly provable by parol evidence; and in such case the written contract is admissible in evidence to determine how far it had been performed, and to ascertain the stipulated time and mode of payment, in order to give it effect as far as it may be applicable in connection with the parol modification of it.[77]

[75] Castagnino v. Balletta, 82 Cal. 250, 259, 23 Pac. Rep. 127.

See "Value," §§ 829 et seq., post.

As to admissibility of special contract under common counts, see Reynolds v. Jourdan, 6 Cal. 108; Steward v. Hinkel, 72 Cal. 187, 13 Pac. Rep. 494; Castagnino v. Balletta, 82 Cal. 250, 259, 23 Pac. Rep. 127; Nichols v. Randall, 136 Cal. 426, 69 Pac. Rep. 26.

[76] Kurtz v. Forquer, 94 Cal. 91, 94, 29 Pac. Rep. 413.

[77] White v. Soto, 82 Cal. 654, 657, 23 Pac. Rep. 210; O'Connor v. Dingley, 26 Cal. 11, 20, 23. But it has been shown that, at least in certain cases, no alteration of the original contract affects any lien of subcontractors: **Kerr's Cyc. Code Civ. Proc.,** § 1184; see "Alteration of Contract," §§ 326 et seq., ante; except with their written consent to the waiver or impairment thereof: **Kerr's Cyc. Code Civ. Proc.,** § 1201; see "Waiver and Release," §§ 627 et seq., ante. It was formerly held that a subsequent contract changing the terms of the original contract was not admissible in evidence against lien claimants, without evidence of their knowledge of it prior to furnishing materials: Shaver v. Murdock, 36 Cal. 293, 297 (1862).

In a suit brought on quantum meruit, for work and labor, testimony is admissible to prove that the original contract has been changed at the request of the defendants, and the value of extra work performed: Mowry v. Starbuck, 4 Cal. 274.

Utah. Conversations held after contract of employment, as to rate of compensation: See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360, 363.

§ 800. Same. Contract admissible to show character of building. It has already been shown that the original contract, whether valid or void, is admissible in evidence to determine the character of the building to be erected, and thereby to furnish the test by which it can be known when the building is completed, for the purpose of filing liens.[78]

§ 801. Same. Contract as evidence with reference to time of performance of labor. Where the contract is not restricted in application to the labor performed after it was signed, the actual time of signing is immaterial; and it seems to be conclusive evidence that the labor mentioned in the contract performed after its date was done subject to its terms.[79]

§ 802. Inadmissibility of indefinite contract. Where the complaint avers that the contract was for grading the south half of Chestnut Street, and the contract offered in evidence was between the contractor and certain owners of lots, "fronting on Chestnut — ½ street," and the contractor was to furnish all the materials and perform the work of constructing, "in front of the property here represented," the contract is too uncertain and indefinite as to the work to be done to be entitled to be admitted in evidence.[80]

§ 803. Parol evidence in aid of false reference. A false reference, in a contract, to the plans and specifications, as being "hereto annexed," cannot be helped out by oral evidence;[81] for, in such case, to permit the parties to prove

Washington. Oral modification of contract with board of county commissioners, not entered in minutes, admissible: See Long v. Pierce County, 22 Wash. 330, 61 Pac. Rep. 142, 146.

Evidence of abandonment of modifications; not excluded for lack of consideration: See Long v. Pierce County, 22 Wash. 330, 61 Pac. Rep. 142, 147.

[78] See §§ 792 et seq., and §§ 315 et seq., ante.

[79] Skym v. Weske Consol. Co. (Cal., Dec. 18, 1896), 47 Pac. Rep. 116.

[80] Rauer v. Fay, 110 Cal. 361, 365, 42 Pac. Rep. 902; Rauer v. Welsh (Cal., Dec. 10, 1895), 42 Pac. Rep. 904.

See "Contract," § 208, ante.

[81] Worden v. Hammond, 37 Cal. 61, 64.

See "Contract," § 208, ante.

that plans and specifications which did not correspond with the reference are the plans and specifications referred to is to make a different contract, or, at least, to open the door to doing so; and such evidence is objectionable, even though it were conclusively shown that the specifications were the ones referred to, it being a question of the making of the contract, and not of its interpretation, as in the case of latent ambiguities.[82]

Signed specifications. Where the statutory original contract refers to specifications which are signed, if such reference is false it cannot be aided by parol evidence, and specifications which are not signed cannot be admitted in evidence.[83]

§ 804. Parol evidence not admissible for construction of contract. And parol evidence is inadmissible to show that a payment under a contract is a condition precedent, and that a failure to make such payment was a prevention of performance of the contract; and, although both parties may know, at the time of making the contract, that the contractors relied, and were compelled by their pecuniary resources to rely, upon the payment by the defendant of the instalments as they became due, yet such evidence is inadmissible to show prevention of performance of the contract to do certain work for which the defendants were to make payments in instalments.[84]

§ 805. Same. Rule not applicable to mere memorandum. The rule prohibiting the introduction of parol evidence for the purpose of cutting down or adding to the terms of a

[82] West Coast L. Co. v. Knapp, 122 Cal. 79, 54 Pac. Rep. 533.
See §§ 208, 292, ante.

[83] Donnelly v. Adams, 115 Cal. 129, 131, 46 Pac. Rep. 916.
See § 208, ante.
Washington. That specifications of contract were drafted by contractor, held immaterial, in the absence of fraud, or under special circumstances, if the language is plain and unambiguous: See Novelty M. Co. v. Heinzerling, 39 Wash. 244, 81 Pac. Rep. 742.

[84] Cox v. McLaughlin, 63 Cal. 196, 205.
See "Performance," §§ 334 et seq., ante.
Washington. The written contract is the highest evidence of its terms: Megrath v. Gilmore, 10 Wash. 339, 39 Pac. Rep. 131.

written contract does not apply to a writing which shows on is face that it is an informal memorandum, and which does not show who was to do the work or who was to pay for it, nor define the mutual obligations of the parties, nor purport to bind any one; and it will be considered in connection with the oral negotiations which preceded it. In order that the rule may have any application, the writing must be one which, by legal construction, shows upon its face that it was intended to express the whole contract between the parties.[85]

§ 806. **Same. Performance of contract.** After the plaintiff has testified fully in relation to the terms of the contract for construction, sued upon, as he claims them to be, and as to the precise work he had agreed to do, and the kind of material which he was to use, it is competent for him to state whether, in point of fact, the work had been done, and such quantity of materials used according to the contract; since the questions did not call for the opinion of the witness, within the meaning of the law excluding the opinions of witnesses, but for facts within his knowledge.[86]

§ 807. **Void original contract admissible for what purpose.** In conformity with the rule laid down in the last preceding section, a void original contract is admissible in an action on the implied contract by the original contractor,

[85] Kreuzberger v. Wingfield, 96 Cal. 251, 255, 31 Pac. Rep. 109.

Instrument not showing on its face that it was intended to express the whole contract between the parties, the rule excluding the parol evidence does not apply: See Kreuzberger v. Wingfield, supra; Harrison v. McCormick, 89 Cal. 327, 26 Pac. Rep. 830, 23 Am. St. Rep. 469; Naumberg v. Young, 44 N. J. L. (15 Vr.) 338; Briggs v. Hilton, 99 N. Y. 517, 3 N. E. Rep. 51, 52 Am. Rep. 63.

Washington. See Megrath v. Gilmore, 10 Wash. 339, 39 Pac. Rep. 131.

[86] Kreuzberger v. Wingfield, 96 Cal. 251, 255, 31 Pac. Rep. 109.

Oregon. Contract not requiring a written demand for additional time of performance, evidence that such demand was not made is immaterial, when weighed by acts of architect: See Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126, 131.

Washington. See Megrath v. Gilmore, 10 Wash. 339, 39 Pac. Rep. 131.

against the owner in personam, to show that the work had not been done in accordance with the express contract.[87]

§ 808. **Same. Invalidity, how shown.** A subclaimant may show the invalidity of the original contract in evidence, without an allegation of its invalidity, in an action to foreclose a lien for the value of the materials furnished at the special instance and request of the owner of the building.[88]

§ 809. **Malperformance of work.** If the plaintiff, in an action to foreclose his lien, introduces evidence to prove that the work upon which the lien is based was performed in a good and workmanlike manner, the defendant has a right to disprove that fact, and to show that it was not so done, even if there be no issue as to whether the work was done in an improper manner.[89]

The evidence of carpenters and architects, to the effect that, as far as the work had progressed at the time the contractor abandoned the building, it was a fair average job for that class of building, does not support an issue as to whether the contractor furnished the kind and quality of materials required by the contract, or whether such a breach of the contract was a substantial one.[90]

[87] Laidlaw v. Marye, 133 Cal. 170, 176, 65 Pac. Rep. 391, **overruling** Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 30 Pac. Rep. 564.
See discussion, §§ 319 et seq., ante.

[88] Yancy v. Morton, 94 Cal. 558, 560, 29 Pac. Rep. 1111.
See "Pleading," §§ 689 et seq., and §§ 319 et seq., ante.

[89] Hagman v. Williams, 88 Cal. 146, 151, 25 Pac. Rep. 1111 (in this case there was an issue as to the performance of the contract, but the opinion does not clearly allude to it); Barilari v. Ferrea, 59 Cal. 1, 4 (testimony as to character of material stricken out, on the ground that witness was not an expert, but afterwards the same testimony was introduced on cross-examination; held, immaterial error).

Montana. Custom as to including "waste" as part of material: See Marsh v. Morgan, 18 Mont. 19, 44 Pac. Rep. 85.

Testimony of contractor, in rebuttal, with reference to non-payment of subcontractor for an alleged defective floor until architect accepted the same, admissible to affect weight of architect's testimony that the floor was defective: Wyman v. Hooker, 2 Cal. App. 36, 41, 83 Pac. Rep. 79.

[90] Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 117, 38 Pac. Rep. 635.

§ 810. **Liquidated damages.** A clause in a contractor's bond, that if the building was not completed by a certain day, the bondsmen should pay a fixed sum for each day's delay, as liquidated damages, does not alone justify a recovery by the owner of such stipulated sum, when there is no evidence that, from the nature of the case, it was impracticable or extremely difficult to fix the actual damage that would result from the non-completion of the building by such date, when the contractor fails to complete same within such time.[91]

§ 811. **Damages. Circumstances surrounding execution of contract. Defendant in default.** Where it appears that a breach of the contract has been made by the defendant, evidence as to whether the plaintiff was informed that it was important that the work should be done within the time specified in the contract, or whether the work done "is" of any present benefit to the defendant, or whether the latter has sustained any loss from the fact that it was not completed within the time specified, may be excluded without material error.[92]

[91] Patent B. Co. v. Moore, 75 Cal. 205, 209, 16 Pac. Rep. 890.

See "Liquidated Damages," §§ 237, 238, ante.

Cost of new staircase not measure of damage for breach of contract, when staircase built was merely defective, and could be remedied at moderate cost; and error to admit evidence as to such cost: See Carpenter v. Ibbetson, 1 Cal. App. 272, 274, 81 Pac. Rep. 1114.

[92] San Francisco B. Co. v. Dumbarton L. & I. Co., 119 Cal. 272, 276, 51 Pac. Rep. 335.

Evidence of circumstances surrounding execution of contract for purpose of estimating damages: See Hale v. Milliken (Cal. App., May 31, 1907), 90 Pac. Rep. 365, 368.

Evidence of nature of services admissible in action for damages for breach of contract; services in obtaining materials and labor of supervising work: See Bryant v. Broadwell, 140 Cal. 490, 495, 74 Pac. Rep. 33.

Nature of concrete-work unconnected with cause of action, after acceptance by superintendent of streets: See Thomason v. Richards, 135 Cal. xx, 67 Pac. Rep. 1056.

Idaho. Evidence of circumstances surrounding execution of contract; prospective profits: See Harris v. Faris-Kesl C. Co. (Idaho, April 4, 1907), 89 Pac. Rep. 760.

Oregon. Opinion of plaintiff as to amount of damage for failure to deliver materials, inadmissible: See United States v. McCann, 40 Oreg. 13, 66 Pac. Rep. 274.

Evidence of difficulties and cost of work: See Aldrich v. Columbia S. R. Co., 39 Oreg. 263, 64 Pac. Rep. 455.

§ 812. Presumption of knowledge by subclaimants of valid contract. Subclaimants are conclusively presumed to have knowledge of the existence of a valid contract and its terms, in the absence of fraud or misrepresentation.[93] The subject of the effect of the validity of the contract as notice has been fully considered in another place, to which reference is made in the note.[94]

§ 813. Evidence of benefit conferred. Evidence that certain work and materials furnished, as a gas plant, added to the value of the plant, or conferred a benefit on the owner thereof, is admissible in a suit on the implied contract; but is inadmissible in a suit on the express contract, whether the original contract is valid or void.[95]

§ 814. Acceptance of performance. It is sufficient for the plaintiff to show full performance of the express contract on his part, and he is not required to prove, in addition, that the work was accepted by the defendant, although such acceptance is alleged in the complaint.[96]

§ 815. Evidence of liability in case of failure to perform, or abandonment. When the contractor fails to perform his contract in full, or abandons the same before completion, evidence must be received, in accordance with section twelve hundred,[97] tending to show the extent of the owner's liability, measured by the rule laid down in that section. Under such circumstances, therefore, the court may admit

Washington. Evidence surrounding execution of contract: See Anderson v. Harper, 30 Wash. 378, 70 Pac. Rep. 965 (difficulties and cost of work).

Demands made by contractor, which, under the contract, were to have been submitted to arbitration, not admissible in action by owner against contractor for payment of liens and cost of completing structure: Main I. Co. v. Olsen (Wash., Sept. 28, 1906), 86 Pac. Rep. 1112.

[93] Henley v. Wadsworth, 38 Cal. 356, 361.

[94] See §§ 315 et seq., ante.

[95] Sims v. Petaluma G. L. Co., 131 Cal. 656, 661, 63 Pac. Rep. 1011, **reversing,** on this point, s. c. 62 Pac. Rep. 300. See Bradbury v. McHenry, 125 Cal. xix, 57 Pac. Rep. 999.

[96] Gilliam v. Brown, 126 Cal. 160, 162, 58 Pac. Rep. 466, s. c. 116 Cal. 454, 48 Pac. Rep. 486.

[97] **Kerr's Cyc. Code Civ. Proc.,** § 1200.

evidence of the value of the work done and materials furnished by the contractor, including material upon the ground not used, estimated by the standard of the whole contract price, and what would be the reasonable cost of completing the building according to the plans and specifications.[98]

§ 816. **Estoppel as evidence.**[99] **General rule.** Where no opportunity to plead an estoppel by deed or matter of record is given, it is conclusive evidence; and if a record that has not been pleaded is offered in evidence as an estoppel, and no objection is made, at the time, that the record has not been specially pleaded, the objection is deemed waived.[100]

§ 817. **Same. Judgment.** Judgments are evidence in actions concerning the same matters for and against the parties thereto, as well as their privies in estate. But where an answer fails to plead another action pending, previously commenced by the plaintiff's subcontractor against an agent of the defendant to recover for the work, the judgment in the action against such agent cannot be an estoppel against the plaintiff, who sues for the same work, if he was not made a party to such action, when, in the subsequent action, the court makes a finding that the work was done by plaintiff and accepted by defendant.[101] And so where a person obtains a judgment against the owner of certain property, and obtained a sheriff's deed by sale of the property

[98] MacDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. Rep. 850.

Washington. Admissibility of new contract of surety for completion of building abandoned by contractor: See Brodek v. Farnum, 11 Wash. 565, 40 Pac. Rep. 189. Compare Savage v. Glenn, 10 Oreg. 440.

[99] See "Extent of Lien," §§ 469 et seq., ante; "Certificates," §§ 239 et seq., § 291, and §§ 672 et seq., ante.

Washington. As to estoppel for delay in bringing action: See McDonald v. Lewis, 18 Wash. 300, 51 Pac. Rep. 387.

[100] Griffith v. Happersberger, 86 Cal. 605, 612, 25 Pac. Rep. 137, 487.

Washington. See De Mattos v. Jordan, 15 Wash. 378, 391, 46 Pac. Rep. 402.

Estoppel as to character of material as personalty upon judgments foreclosing lien and enjoining sale of same as personalty: See Potvin v. Denny H. Co., 37 Wash. 323, 79 Pac. Rep. 940.

[101] Griffith v. Happersberger, 86 Cal. 605, 612, 25 Pac. Rep. 137, 487. See "Parties," §§ 662 et seq., ante.

under such judgment, and thereafter a lien claimant begins an action to enforce his lien against the property, the claim of lien having been recorded before such judgment had been docketed, and such judgment creditor was not joined as a party defendant, and the lien claimant became the purchaser under the judgment foreclosing his lien, and the owner thereafter purchased of the judgment creditor the title which the latter had obtained under his sheriff's deed, where the lien claimant brought an action against the owner to recover possession, the owner was not estopped by the lien claimant's judgment from setting up the new title which he had acquired from such judgment creditor.[102] But where the complaint alleges the execution of a mortgage by a corporation, and seeks its foreclosure, which is decreed, the purchaser of the mortgaged property at sheriff's sale, during the pendency of the first action, under a judgment foreclosing a lien younger than the lis pendens filed in the first action, is estopped from urging that the mortgage was not the act of the corporation.[103]

§ 818. **Same. Owner estopped.** The owner of the property is estopped from making a defense based on the illegality of the formation of a copartnership by several corporations, which sold and delivered materials therefor, where the action to foreclose the lien for such material is brought by the assignee of the partnership; for, when one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be heard to say that the corporation has no existence, and for that reason no contract was made.[104]

[102] Flandreau v. Downey, 23 Cal. 354, 359.

[103] Horn v. Jones, 28 Cal. 194, 204 (1855).

See § 818, post.

As to effect of lis pendens and rights of purchasers pendente lite, see **Kerr's Cyc. Code Civ. Proc.,** § 409, and note.

[104] Yancy v. Morton, 94 Cal. 558, 560, 29 Pac. Rep. 1111.

See § 817, ante. See Camp v. Land, 122 Cal. 167, 169, 54 Pac. Rep. 839; Fresno C. & I. Co. v. Warner, 72 Cal. 379, 383, 14 Pac. Rep. 37.

Distinguished in Frazier v. Murphy, 133 Cal. 91, 96, 65 Pac. Rep. 326, as to presenting of claim for probate, where individual conducted business under firm name.

§ 819. **Same. Owner estopped by acts of reputed owner.** The owner of property may, by his acts and conduct, be estopped from questioning the acts of a reputed owner.[105] This matter has already been considered at some length, and the distinction between equitable estoppel and the peculiar statutory estoppel frequently found in mechanic's-lien laws pointed out.[106]

§ 820. **Same. Surety not estopped to foreclose lien.** The fact that a material-man was a surety on the bond that the contractor would not impose any liens on the building does not estop him from setting up a lien on the building,[107] whatever effect the execution of such bond may have as a waiver or as a basis for set-off and counterclaim. This subject has already been considered in another place.[108]

§ 821. **Same. Estoppel of contractors on bond.** Even where the contract is void, the act of contractors in giving a bond as an independent security, and thereby inducing the owner of the building to make full payment of the contract price to them, estops the contractors on the bond from

Colorado. As to owner's interest bound by estoppel, see Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340.

Hawaii. Estoppel as to sale of material: See Allen v. Redward, 10 Hawn. 151, 158.

Washington. In an action for grading-work, defendant not estopped by acquiescence: See Erickson v. Hochbrune (Wash., Aug. 27, 1907), 91 Pac. Rep. 485.

[105] Santa Cruz R. P. Co. v. Lyons, 117 Cal. 212, 213, 48 Pac. Rep. 1097, 59 Am. St. Rep. 174.

See "Extent of Lien," §§ 438 et seq., ante; "Estoppel," §§ 469 et seq., ante.

[106] See §§ 469 et seq., ante.

Alaska. Owner permitting improvements: See Chambers v. Hannum, 1 Alas. 468.

Washington. Defendant not estopped to deny grading was done with his acquiescence: See Erickson v. Hochbrune (Wash., Aug. 27, 1907), 91 Pac. Rep. 485.

[107] Schallert-Ganahl L. Co. v. Neal, 90 Cal. 213, 215, sub nom. Stovell v. Neal, 27 Pac. Rep. 192; Blyth v. Torre (Cal., Dec. 4, 1894), 38 Pac. Rep. 629. See Patent B. Co. v. Moore, 75 Cal. 205, 207, 16 Pac. Rep. 890; Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

See "Sureties," §§ 605 et seq., ante.

Washington. Estoppel of owner to deny rescission of contract, so far as surety is concerned: See Gottstein v. Seattle L. & C. Co., 7 Wash. 424, 35 Pac. Rep. 133.

[108] See §§ 619, 620, ante.

disputing the truth of a recital of the bond as to the contract, and from denying their liability upon it for liens which they failed to discharge, and which the owner was compelled to pay.[109]

§ 822. **Forfeiture and fraud.**[110] The provisions of section twelve hundred and two,[111] that any person who shall wilfully give a false notice of his claim to the owner under the provisions of section eleven hundred and eighty-four,[112] and any person who shall wilfully include in his claim filed under section eleven hundred and eighty-seven,[113] work not performed on or materials not furnished for the property described in the claim, shall also forfeit his lien, are to the effect that the claimant shall forfeit his lien in toto for a violation of such provisions, and are penal in character, and must not only be strictly construed, but the evidence under which they are invoked should be clear and convincing that the violation was wilful and intentional.[114]

§ 823. **Same. Rescission as evidence of fraud.** Where persons were given a right to rescind an arrangement made to extend a lien, such extension having been made under a misapprehension as to the applicability of the law allowing

[109] Kiessig v. Allspaugh, 91 Cal. 234, 238, 27 Pac. Rep. 662, 13 L. R. A. 418.

See "Sureties," §§ 605 et seq., ante.

Where the original contractor alleges or admits the subclaimant's right to the amount due from the owner, the contractor is afterwards unable to recover from owner: See Union L. Co. v. Simon (Cal. App., March 13, 190', and Cal. Sup.), 89 Pac. Rep. 1077, 1080, 1081.

Purchaser of property of estate assuming debt created by contract with executor, not estopped to file claim of lien: See San Francisco P. Co. v. Fairfield, 134 Cal. 220, 223, 66 Pac. Rep. 255.

[110] See, generally, "Forfeiture of Lien," §§ 627 et seq., ante; "Fraud in Contract," § 207, ante.

Arizona. In the absence of fraud or bad faith, evidence to segregate lienable items from those not lienable: See Wolfley v. Hughes (Ariz., March 30, 1903), 71 Pac. Rep. 951.

[111] **Kerr's Cyc. Code Civ. Proc.,** § 1202.

[112] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[113] **Kerr's Cyc. Code Civ. Proc.,** § 1187.

[114] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 365, sub nom. Stovell v. Neal, 27 Pac. Rep. 192. See Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 235, 39 Pac. Rep. 758.

See "Waiver and Forfeiture," §§ 627 et seq., ante; "Construction," §§ 26, 227, ante.

the same, the debt being legal and just, and the plaintiff having acquired no rights which it would be inequitable to disturb, it was held that such rescission was no evidence of fraud.[115]

§ 824. **Same. Fraudulent representations.** Where suit to foreclose a mechanic's lien is brought, and defendant denied the performance of the contract sued on, and sets up another contract for a certain sum, which included extra work sued for by plaintiff upon a quantum meruit count for a balance due, when defendant introduces such contract in evidence, plaintiff may show in rebuttal that he signed it under representations made by defendant, and never intended to sign that contract, but supposed he was signing one previously drawn up in lead-pencil, which is not the one sued upon.[116]

§ 825. **Use of materials in building.**[117] It has already been seen that the evidence must show that the materials were used in the building;[118] and where materials so used

[115] Gamble v. Voll, 15 Cal. 508, 510.

See §§ 326 et seq., ante.

[116] Cummings v. Ross, 90 Cal. 68, 71, 27 Pac. Rep. 62.

[117] See §§ 87 et seq., ante.

Colorado. Secondary evidence of assignment of claim for labor: See Everett v. Hart, 20 Colo. App. 93, 77 Pac. Rep. 254.

Utah. Evidence as to dates when first and last materials were furnished was admitted: Morrison v. Inter-Mountain S. Co., 14 Utah 201, 46 Pac. Rep. 1104.

[118] Houghton v. Blake, 5 Cal. 240, 241.

See "Materials," §§ 87 et seq., ante.

Colorado. Evidence that materials were to be used in building required: Tabor-Pierce L. Co. v. International T. Co., 19 Colo. App. 108, 75 Pac. Rep. 150.

Evidence as to quality of material furnished with reference to sample: See San Miguel Consol. G. M. Co. v. Stubbs (Colo., April 1, 1907), 90 Pac. Rep. 842.

Admission by purchaser of use of material in structure prima facie evidence: See Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419.

Hawaii. Proof that materials were ordered for a building, and furnished therefor and delivered thereat, prima facie proof that they were used in the building: Allen v. Redward, 10 Hawn. 151, 158.

Presumption that materials furnished to be used were used in building; and proof that a portion only were so used does not, as a matter of law, destroy the presumption as to the remainder: Allen v. Lincoln, 12 Hawn. 356.

are sold under a written contract which is silent as to the use or purpose for which such materials are intended to be put, parol evidence may be admitted to show such purpose, in order to enforce a lien therefor; since such evidence does not contradict nor add any new term to the written contract.[119]

§ 826. Money advanced. Evidence as to money advanced by assignee of subcontractor's interest in last payment, and used by him for work done under the subcontract, with

Oklahoma. As to presumption that all material was used in building after delivery of same, and use of some of it, see Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303.

Oregon. "To require direct and positive testimony that, as to each specific article delivered, it was in fact used in the buildings, would make the mechanic's-lien law more of a burden and a trap, than a blessing and a help. When materials are contracted for use in a proposed building, when they are delivered in pursuance of such contract, and when the building is in fact completed, and there is no testimony tending to raise even a suspicion that the materials therefor were elsewhere obtained, or that those contracted for were not used therein, and especially when some of the materials are shown to have actually entered into its construction, it is fair to conclude and say that such materials did in fact go into the building, and that the seller has a mechanic's lien therefor": Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54, **quoting** Rice v. Hodge, 26 Kan. 170.

Time-checks given by the contractor to the laborer, though not conclusive against the owner of the structure, "are declarations of the defendant's agent in the line of his employment, and are to be considered for what they are worth": Forbes v. Willamette Falls E. Co., 19 Oreg. 61, 23 Pac. Rep. 670, 20 Am. St. Rep. 793.

Utah. See, as to the "Oregon doctrine," supra, McCornick v. Saddler, 10 Utah 210, 37 Pac. Rep. 332, in which it is held that where a building contractor's only knowledge as to the amount of lumber purchased from a firm, and which went into the construction of a building, was received from certain bills and checks, some of which had been lost, but were correct, and he was not present when all the lumber was delivered, and did not measure it, nor order all of it, his evidence as to such amount is hearsay.

Washington. Same principle as to time-checks as Oregon case, this note, supra: See Garneau v. Port Blakeley M. Co., 8 Wash. 467, 36 Pac. Rep. 463. Same quotation from Rice v. Hodge, 26 Kan. 170, as Oregon case, this note, supra: Seattle L. Co. v. Sweeney, 43 Wash. 1, 85 Pac. Rep. 677.

[119] Donahue v. Cromartie, 21 Cal. 80, 86. See Neilson v. Iowa E. R. Co., 51 Iowa 184, 186, 1 N. W. Rep. 434, 33 Am. Rep. 124.

Colorado. Hearsay evidence: Custom of store with reference to sales and delivery of goods: See Stidger v. McPhee, 15 Colo. App. 252, 62 Pac. Rep. 332.

Montana. Evidence as to date of first item was held admissible to show right to lien and right to assign lien: Mahoney v. Butte H. Co., 19 Mont. 377, 48 Pac. Rep. 545.

the knowledge of contractor, is immaterial, in an action by such assignee of the subcontractor against the contractor.[120]

§ 827. Questions of fact.[121] The following are questions of fact: Payment;[122] time of completion of building;[123] what constitutes a trivial or trifling imperfection;[124] whether the work done after a certain date was to remedy a trifling imperfection;[125] generally, the sufficiency of a description of property,[126] or sufficiency for identification;[127] the character of occupancy;[128] whether the build-

[120] Pohlman v. Wilcox, 146 Cal. 440, 442, 80 Pac. Rep. 625.

[121] **Oregon.** As to whether materials affixed are fixtures is a mixed question of law and fact: Matthiesen v. Arata, 32 Oreg. 342, 346, 50 Pac. Rep. 1015, 67 Am. St. Rep. 535.

Washington. Whether architect's decision was just and impartial, question of fact: See Long v. Pierce County, 22 Wash. 330, 61 Pac. Rep. 142.

Fixture, question of fact: See Philadelphia M. & T. Co. v. Miller, 20 Wash. 607, 56 Pac. Rep. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559.

Neglect of contractor, question of fact: Novelty M. Co. v. Heinzerling, 39 Wash. 244, 81 Pac. Rep. 742.

[122] Barilari v. Ferrea, 59 Cal. 1, 4; Simons v. Webster, 108 Cal. 16, 18, 40 Pac. Rep. 1056.

Washington. Time at which work on building was completed is a question of fact: See Ellsworth v. Layton, 37 Wash. 340, 79 Pac. Rep. 947.

So whether the receiving of a check for the amount of a disputed claim was an acceptance of it as a full settlement, although the check recites that it is, is a question proper to be submitted to the jury, when there is a controversy as to the facts: Megrath v. Gilmore, 10 Wash. 339, 39 Pac. Rep. 131.

[123] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 208, 29 Pac. Rep. 633; Coss v. MacDonough, 111 Cal. 662, 666, 44 Pac. Rep. 325. See Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 378, 51 Pac. Rep. 555; Schallert-Ganahl L. Co. v. Sheldon (Cal., Feb. 9, 1893), 32 Pac. Rep. 235.

[124] Willamette S. M. Co. v. Kremer, supra; Willamette S. M. Co. v. Los Angeles College Co., 94 Cal. 229, 238, 29 Pac. Rep. 629; Coss v. MacDonough, supra; Marble Lime Co. v. Lordsburg H. Co., 96 Cal. 332, 334, 31 Pac. Rep. 164; Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610; Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 378, 51 Pac. Rep. 555 (there was no test by which it could be determined that the building was completed). See Schallert-Ganahl L. Co. v. Sheldon (Cal., Feb. 9, 1893), 32 Pac. Rep. 235.

Colorado. Questions of fact: Trifling imperfection; material alterations of contract: Stidger v. McPhee, 15 Colo. App. 252, 62 Pac. Rep. 332.

[125] Coss v. MacDonough, 111 Cal. 662, 666, 44 Pac. Rep. 325.

[126] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 209, 29 Pac. Rep. 633. See § 399, ante.

[127] Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1079.

[128] Willamette S. M. Co. v. Los Angeles College Co., 94 Cal. 229, 239, 29 Pac. Rep. 629.

ing was completed;[129] whether there was a continuance of work during a certain period, or a cessation of work for thirty days;[130] whether there was a substantial performance of the contract;[131] whether several mining claims are owned and operated as one mine;[132] whether the materials furnished were so affixed to the building as to become a part thereof.[133]

§ 828. Questions of law.[134] But, whether the plaintiff has a lien,[135] or has complied with the requirements of the provisions of the law,[136] or has filed his claim within the

[129] Willamette S. M. Co. v. Los Angeles C. Co., 94 Cal. 229, 237, 29 Pac. Rep. 629; Marble L. Co. v. Lordsburg H. Co., 96 Cal. 332, 334, 31 Pac. Rep. 164.

Colorado. Or whether it was completed within a reasonable time, when the contract does not specify any particular time of completion: Walling v. Warren, 2 Colo. 434.

[130] Marble L. Co. v. Lordsburg H. Co., 96 Cal. 332, 334, 31 Pac. Rep. 164.

[131] Harlan v. Stufflebeem, 87 Cal. 508, 512, 25 Pac. Rep. 686; Perry v. Quackenbush, 105 Cal. 299, 306, 38 Pac. Rep. 740; Marble L. Co. v. Lordsburg H. Co., 96 Cal. 332, 334, 31 Pac. Rep. 164.

See §§ 806, 801, ante.

Montana. Whether materials furnished or labor performed under one or more original contracts, question of fact: Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 417.

[132] Hamilton v. Delhi M. Co., 118 Cal. 148, 50 Pac. Rep. 378.

[133] Bianchi v. Hughes, 124 Cal. 24, 28, 30, 56 Pac. Rep. 610 (ice-room constructed by lessee); Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

See "Questions of Law," § 828, post.

Montana. Whether materials were delivered under an entire contract or under separate ones, and whether there was a running account between the parties under which the orders were filled, were held to be questions of fact: Helena S. H. & S. Co. v. Wells, 16 Mont. 65, 40 Pac. Rep. 78.

Washington. So whether materials are in good faith designed to be used in the construction of a building: Potvin v. Wickersham, 15 Wash. 646, 47 Pac. Rep. 25; or that the contractors were the "agents" of the owner: Sautter v. McDonald, 12 Wash. 27, 31, 40 Pac. Rep. 418.

[134] See also "Pleading," § 737, ante.

Oklahoma. Building, real or personal property, held to be a question of law, to be determined from the facts: Bridges v. Thomas, 8 Okl. 620, 58 Pac. Rep. 955.

See § 827, ante.

[135] Bradbury v. Cronise, 46 Cal. 287, 289; Curnow v. Happy Valley B. G. & H. Co., 68 Cal. 262, 266, 9 Pac. Rep. 149.

Instruction to jury as to levy of assessment being an acceptance of work, question of law: See Gilliam v. Brown, 116 Cal. 454, 48 Pac. Rep. 486.

[136] Curnow v. Happy Valley B. G. & H. Co., supra.

Washington. Likewise, it has been held, whether the materials are such as are lienable articles or of a kind or character to be used in the construction of a building: Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099.

time required by law,[137] or has priority of lien,[138] is a conclusion of law. Whether a bond is a common-law or a statutory bond is a question of law, not for the witness to determine; and whether claimant relied upon a statutory bond at the time of entering into the contract is immaterial.[139]

§ 829. **Value. Valid contract as evidence thereof. Action on implied contract.** A valid building contract is admissible in evidence as proof of the value of materials furnished and services rendered, but is by no means conclusive on that point, in an action on the implied contract after prevention of performance, and such evidence is to be taken with the other evidence in arriving at such value.[140]

§ 830. **Same. Common counts.** Where plaintiff has introduced evidence showing the complete performance of a valid contract, and that the payment of the money due merely remained, the special valid contract is admissible in evidence, under the common counts, as an admission of the standard of value.[141]

§ 831. **Same. Contract as evidence of extra work. Express contract.** In an action to foreclose the lien, based upon the valid contract, it is conclusive as to the value of the work done under it, and also as to the extra work, so far as it fixes the value; the court saying, "Appellant claims

[137] Pierce v. Willis, 103 Cal. 91, 93, 36 Pac. Rep. 1080.

Washington. Contra; it is a question of fact: Johnston v. Harrington, 5 Wash. 73, 82, 31 Pac. Rep. 316.

The true rule seems to be, that the time within which the claim should be filed is a question of law, but that the question whether or not the claim was filed within that time is a question of fact.

[138] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 236, 39 Pac. Rep. 758.

See "Answer," §§ 738 et seq., ante.

[139] Union S. M. Works v. Dodge, 129 Cal. 390, 397, 62 Pac. Rep. 41.

See §§ 281 et seq., and §§ 605 et seq., ante.

[140] Adams v. Burbank, 103 Cal. 646, 650, 37 Pac. Rep. 640. See Cox v. McLaughlin, 54 Cal. 605, 610.

[141] Castagnino v. Balletta, 82 Cal. 250, 259, 23 Pac. Rep. 127.

See "Complaint," §§ 673 et seq., ante.

that there was no evidence of the reasonable value of the work done by the plaintiffs. As the memorandum of the contract between W. and the owner is sufficient, the contracts between the contractor and the subcontractors are conclusive, both as to their principal contracts and as to contracts for extra work, so far as they fixed the value. Where the value was not fixed by contract, other proof of value must be made." [142]

§ 832. Same. Void contract. The price of materials agreed upon in a void statutory original contract is now held to be prima facie evidence of their value,[143] at least as far as the owner and contractor are concerned.[144] At first there was some uncertainty in the decisions as to whether a void original contract is admissible as evidence of the value of the work done and materials furnished. In an action on a quantum meruit, by the original contractor, against the owner, it was held that the void statutory original contract is not admissible in evidence.[145] But in an action to foreclose a lien upon the property by subclaimants, where the statutory original contract was void, it was said: "To prevent misapprehension, it may be added that if the memorandum filed was not in compliance with the statute, the contract price agreed by the contractor to be paid to the subcon-

[142] Joost v. Sullivan, 111 Cal. 286, 296, 43 Pac. Rep. 896.

See § 832, post.

Colorado. See Merriner v. Jeppson, 19 Colo. App. 218, 74 Pac. Rep. 341.

[143] Bringham v. Knox, 127 Cal. 40, 44, 59 Pac. Rep. 198.

[144] See Laidlaw v. Marye, 133 Cal. 170, 65 Pac. Rep. 391.

See §§ 319 et seq., ante.

[145] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 395, 30 Pac. 564. It was said (p. 396): "But, even conceding that the void contract is merely competent evidence, tending to prove the value of the labor and materials, but not conclusive, its effect was only to create a conflict with other evidence tending to support the finding in question."

Quære: Might it not have been admissible as an admission of value? Compare also Kuhlman v. Burns, 117 Cal. 469, 49 Pac. Rep. 585. See following note.

Rule of Rebman v. San Gabriel V. L. & M. Co., supra, was overruled by Laidlaw v. Marye, 133 Cal. 170, 65 Pac. Rep. 391 (so far as relates to subclaimants).

See §§ 319 et seq., ante.

tractors is evidence of value; but such evidence may be rebutted."[146] Under a void statutory original contract, plaintiff's testimony as to the reasonable value of certain work, and as to his knowledge of the charge of persons engaged in the business, for similar work, is admissible, and relevant and material, in an action in assumpsit.[147] Where the statutory original contract is void, an averment in the complaint of a subclaimant as to the contract price for materials is prima facie evidence of their value, and need

[146] Joost v. Sullivan, 111 Cal. 286, 296, 43 Pac. Rep. 896 (dictum), citing Booth v. Pendola, 88 Cal. 36, 41, 44, 23 Pac. Rep. 200, 24 Pac. Rep. 714, 25 Pac. Rep. 1101, in which it was held that the contract price agreed upon between the contractor and material-man and laborers is prima facie evidence of value of the materials furnished and labor performed, where the statutory original contract is void. This case was not noticed in Willamette S. M. Co. v. Los Angeles College Co., 94 Cal. 229, 236, 240, 29 Pac. Rep. 629, a suit to foreclose a lien on the property by subclaimants, in which it was said: "It [the void statutory original contract] cannot be the basis of a recovery by the contractor against the owner, nor can it be looked to for the purpose of determining the amount for which the owner is liable, or when any payment is to be made. In any action against him by a laborer or material-man, their rights are to be determined by other rules, and irrespective of any provision of such contract. . . . Inasmuch as by a failure to file the contract in the recorder's office it became wholly void, it was not available as a defense for any purpose, either to determine the amount of the contract price, or to limit the liability of the appellant [the owner], or as the foundation of a right to complete the building according to its terms." Also quoted in Rebman v. San Gabriel Valley L. & W. Co., 95 Cal. 390, 30 Pac. Rep. 564.

See also §§ 319 et seq., ante.

In Booth v. Pendola, supra, it was said: "The contract between the owner and Hamilton [the contractor] was never filed for record. It was void; and, while it is doubtless true that the contract price agreed upon between Hamilton, the agent of the owner, and the material-men and laborers, is prima facie evidence of the value of the materials furnished and labor performed, and would support a finding of value, we think that an allegation and a finding on the subject are essential to support a judgment in actions of this character. . . . Appellant contends that there is no sufficient finding of the value of the materials and labor furnished by two of the lien claimants. But the court finds that they were employed by Hamilton, the contractor, at a certain price; and as, under the code, Hamilton was the agent of the owner, we think that this was sufficient."

See "Agency," §§ 572 et seq., ante.

Colorado. Charles v. Hallack L. & M. Co., 22 Colo. 283, 43 Pac. Rep. 548 (the contract is prima facie evidence of value as against the owner).

[147] Camp v. Behlow, 2 Cal. App. 699, 702, 84 Pac. Rep. 251, **not following** Kuhlman v. Burns, 117 Cal. 469, 49 Pac. Rep. 585, on this point, declaring it to be no longer the law. See Laidlaw v. Marye, 133 Cal. 170, 65 Pac. Rep. 391.

not be proven at the trial, when the allegation is not specially demurred to, nor denied in the answer.[148]

§ 833. **Same. Market price. Usual price.** A general rule relating to value is, that proof of the market price is evidence of the value of the materials.[149]

Usual price. Where the claim of lien states that the price agreed upon was "the usual price, and what said materials were reasonably worth at their place of business," it states, in legal effect, a contract that the materials were to be paid for on delivery at what they were reasonably worth, and is sufficiently sustained by proof that the materials contracted for were furnished on orders of the architects and used in the building, and were reasonably worth a certain sum; and it is not necessary to prove an express agreement to pay the usual price, and what said materials were reasonably worth, at the claimants' place of business.[150]

[148] **Although an averment of evidence of the fact,** rather than the ultimate fact itself: Bringham v. Knox, 127 Cal. 40, 45, 59 Pac. Rep. 198, **citing** Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 25 Pac. Rep. 747; Amestoy v. Electric R. T. Co., 95 Cal. 311, 30 Pac. Rep. 550; Mullally v. Townsend, 119 Cal. 47, 52, 50 Pac. Rep. 1066.

Followed: Carpenter v. Furrey, 128 Cal. 665, 669, 61 Pac. Rep. 369; Anderson v. Bank of Lassen County, 140 Cal. 695, 699, 74 Pac. Rep. 287.

Objections going to sufficiency of statement of facts, and not to the facts themselves, must be by special demurrer, pointing out the defects complained of: Mullally v. Townsend, 119 Cal. 47, 52, 50 Pac. Rep. 1066. See Himmelmann v. Spanagel, 39 Cal. 401, 402; Tehama County v. Bryan, 68 Cal. 57, 59, 8 Pac. Rep. 673; Harnish v. Bramer, 71 Cal. 155, 158, 11 Pac. Rep. 888; Grant v. Sheerin, 84 Cal. 197, 200, 23 Pac. Rep. 1094; Amestoy v. Electric R. T. Co., 95 Cal. 311, 314, 30 Pac. Rep. 550.

Same. General demurrer will not reach the defect: Tehama County v. Bryan, 68 Cal. 57, 59, 8 Pac. Rep. 673; Harnish v. Bramer, 71 Cal. 155, 158, 11 Pac. Rep. 888; see Grangers' Business Assoc. v. Clark, 84 Cal. 201, 23 Pac. Rep. 1081; Grant v. Sheerin, 84 Cal. 197, 200, 23 Pac. Rep. 1094; Ryan v. Jaques, 103 Cal. 280, 284, 37 Pac. Rep. 186; Mullally v. Townsend, 119 Cal. 47, 52, 50 Pac. Rep. 1066; Larkin v. Mullen, 128 Cal. 449, 453, 60 Pac. Rep. 1091; Buckman v. Hatch, 139 Cal. 53, 60, 72 Pac. Rep. 445.

[149] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 380, 51 Pac. Rep. 555.

Idaho. Conflict as to evidence of contract price under express contract, evidence of actual cost admissible: See Lewis v. Utah Const. Co., 10 Idaho 214, 77 Pac. Rep. 336.

[150] Reed v. Norton, 90 Cal. 590, 597, 26 Pac. Rep. 767, 27 Id. 426.

Washington. Value of material not equal to contract, but shown approximately, as defense: See Kruegel v. Kitchen, 33 Wash. 214, 74 Pac. Rep. 373, 375.

§ 834. **Same. Other evidence of value.** The time reasonably necessary to be occupied in performing the services is one of the facts and circumstances to be considered in determining the value of the services of an architect;[151] and a subsequent agreement to pay a certain sum is evidence of the reasonable value of services, where the contract is implied.[152] The evidence of experts as to value is admissible.[153]

[151] Ehlers v. Wannack, 118 Cal. 310, 311, 50 Pac. Rep. 433.

[152] Webb v. Kuns (Cal., July 25, 1898), 54 Pac. Rep. 78.

[153] Ehlers v. Wannack, 118 Cal. 310, 311, 50 Pac. Rep. 433.

Expert evidence as to the value of work, putting together the bottoms of caissons: Pacific R. M. Co. v. English, 118 Cal. 123, 130, 50 Pac. Rep. 383.

Idaho. See American B. Co. v. Regents of University, 11 Idaho 163, 81 Pac. Rep. 604, 612.

CHAPTER XXXIX.

VARIANCES.

§ 835. Variances. Generally.
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§ 862. Same. Subclaimant. Owner's employee.
§ 863. Same. Bond. Signed by principals. Unsigned.

§ 835. Variances.[1] Generally. A variance between the claim of lien and proof differs greatly in its results from a variance between the claim of lien and the pleadings; for

[1] See, generally, "Claim," §§ 361 et seq., ante; especially, "Mistake and Error," §§ 412 et seq., ante, and "Complaint," §§ 672 et seq., ante.

See **Kerr's Cyc. Code Civ. Proc.,** Stats. and Amdts. 1906-07, § 1203a.

the latter may be amended to conform to the evidence, while the former may not. The effect of error in the claim of lien has already been considered at some length,[2] and the effect of the new provision of 1907, adding section twelve hundred and three a,[3] has been dwelt upon elsewhere,[4] and will not be repeated in this place.

§ 836. Claim of lien. Pleadings. Proof. Generally. A statement in the claim, which is not required to be made by the statute, and which is erroneous, will not form the basis for a material variance.[5] As a general rule, where the variances between the evidence on the one hand, and the complaint and claim of lien on the other, are trifling, and do not go to any matter of substance, and could not have misled the opposing party in any way, to their injury, they are not fatal.[6]

The contract[7] stated in the claim of lien must be the same in all essentials as that alleged in the complaint.[8]

§ 837. Claim of lien. Pleadings. Material variances.[9] In accordance with the rule stated in the preceding section, before the enactment of section twelve hundred and three a in 1907, the following have been held to be material variances.

Colorado. Variance, where claim sets up contract with consideration, and complaint without consideration: Harris v. Harris, 9 Colo. App. 211, 219, 47 Pac. Rep. 841.

As to variance, claim and complaint, see Harris v. Harris, 18 Colo. App. 34, 69 Pac. Rep. 309.

As to variance between claim of lien and notice of intention to claim lien, immaterial (agreed and reasonable value): See Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786, 791.

[2] §§ 412 et seq., ante.

[3] **Kerr's Cyc. Code Civ. Proc.,** Stats. and Amdts. 1906-07, § 1203a.

[4] §§ 412 et seq., ante.

[5] Slight v. Patton, 96 Cal. 384, 386, 31 Pac. Rep. 248.

[6] Macomber v. Bigelow, 126 Cal. 9, 16, 58 Pac. Rep. 312.

[7] **Material variances:** See Boscow v. Patton, 136 Cal. 90, 68 Pac. Rep. 490, **explaining** Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 Pac. Rep. 555, and Wilson v. Nugent, 125 Cal. 280, 57 Pac. Rep. 1008.

[8] See San Pedro L. Co. v. West, 3 Cal. App. 757, 86 Pac. Rep. 993 (contract for all materials for building).

[9] Malone v. Big Flat G. M. Co., 76 Cal. 578, 581, 18 Pac. Rep. 772. But see Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 499.

Express and implied contract. It is a material variance if the complaint is on a quantum meruit, and the contract stated in the claim is for a fixed price.[10]

Work. Work and materials. If the claim is for work, and the complaint is for work and materials, it is a material variance.[11]

§ 838. **Same. Persons contracting. Husband and wife.** Likewise if the claim states that the contract was made with the wife with the knowledge, consent, and acquiescence of the husband, it not being his contract, and the complaint alleges that the contract was made with the defendants, husband and wife, it is a material variance.[12]

§ 839. **Same. Immaterial variances.** The following have been held to be immaterial variances.

Valid, void contract. Contractor as agent of owner. There is no fatal variance between the claim of lien and the complaint, where the claim treats the original contract as valid, and states that the contractor purchased the materials both as contractor and as agent of the owner, while the complaint alleged that the statutory original contract was void for want of filing, and that the contractor purchased the materials as agent of the owner only.[13]

[10] Malone v. Big Flat G. M. Co., 76 Cal. 578, 581, 18 Pac. Rep. 772; Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 596, 25 Pac. Rep. 747.

Montana. But otherwise where the complaint alleged the price as being both the agreed price and the reasonable value, and the account stated a certain amount as per agreement and another amount as the reasonable value: Bardwell v. Anderson, 18 Mont. 528, 46 Pac. Rep. 443.

[11] Wagner v. Hansen, 103 Cal. 104, 106, 37 Pac. Rep. 195.

[12] Palmer v. Lavigne, 104 Cal. 30, 34, 37 Pac. Rep. 775.

Oregon. See, as variance, name of purchaser: Osborn v. Logus, 28 Oreg. 302, 38 Pac. Rep. 190, 42 Pac. Rep. 997.

Utah. But it was held no material variance, where the claim states that the materials furnished and labor performed were in pursuance of a contract made by claimants with "Braun, Carrol, and Kern, and A. Nink," who were the principal contractors, employed by the owner, Clift, and the complaint alleged that claimant, "at the request of Clift and his architects, Carrol and Kern, furnished material," etc.: Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85.

Washington. But see, contra, Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712.

[13] Reed v. Norton, 90 Cal. 590, 598, 26 Pac. Rep. 767, 27 Pac. Rep. 426. See McIntyre v. Trautner, 63 Cal. 429.

§ 840. **Same. Valid, void contract. Owner purchasing directly.** It is an immaterial variance where a subclaimant's claim sets up an original contract, and the complaint against the owner avers facts showing that the contract with the owner was void, and that he is deemed, under the statute, to have furnished the materials and labor at the personal instance and request of the owner.[14]

§ 841. **Same. Description of property.** The variance is immaterial where the claim described property sufficient to embrace the entire building, and the complaint described property less in extent;[15] or where the claim describes a building as situated upon a portion of the land, and the complaint describes the building as situated upon the entire lot.[16]

§ 842. **Same. Payments.** It is an immaterial variance where the claim correctly states that one hundred dollars of the contract price was to be paid upon completion and the balance thirty days after the completion of the building, and the complaint states that three fourths of the contract price was to be paid during the progress of the work and the balance thirty-five days after the completion, as the mistake in the complaint could not have misled the defendant.[17]

§ 843. **Claim of lien and proof.**[18] **Generally.** It has been held that the effect of a variance between the pleading and

[14] Coss v. MacDonough, 111 Cal. 662, 667, 44 Pac. Rep. 325; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860.

[15] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 211, 29 Pac. Rep. 633.
See "Description," §§ 399 et seq., ante; §§ 717 et seq., ante.

[16] Brunner v. Marks, 98 Cal. 374, 377, 33 Pac. Rep. 265.
See "Description," §§ 399 et seq., ante; §§ 717 et seq., ante.
Oregon. Or where the claim describes the land as being in "Carter's Addition," and the complaint avers that it is in "Market Street Addition": Joshua Hendy Machine Works v. Pacific Cable Const. Co., 24 Oreg. 52, 33 Pac. Rep. 403.
Washington. Or where the complaint differed from the claim only as to the number of the house, the description being otherwise sufficient: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571.

[17] Webb v. Kuns (Cal., July 25, 1898), 54 Pac. Rep. 78, 79.
See §§ 845, 861, post.

[18] See "Claim," §§ 379 et seq., and §§ 706 et seq., ante.
As to variance between claim and evidence, see Jones v. Kruse, 138 Cal. 613, 617, 618, 72 Pac. Rep. 146 (value of material, including cart-

the proof generally is not governed by the same rules as in the case of a variance between the claim of lien and the proof. The claim of lien must contain a correct statement of the facts required by the statute, and unless so stated, no lien can be enforced; while a variance between the complaint and the proof is otherwise not material, unless the adverse party has been misled thereby to his prejudice.[19] But, as the claim of lien is only a link in the chain of evidence to sustain the lien, the status of the claim, after it has been fixed by construction, should, in reason, be viewed as any other piece of evidence.

§ 844. Same. Material variances. The following have been held to be material variances between the claim of lien and the proof.

Agreed price. Reasonable value. The variance is fatal, where the claim of lien states that the work was done at an agreed price, and the evidence showed a contract to pay the reasonable value of the services;[20] or where the claim stated an agreement to pay the then prevailing list price, and that no terms for payment were specially agreed to, and the finding was that there was no agreement to pay the list price, or any particular price, but that the material should be paid for upon completion of the house.[21] Likewise where the claim states nothing as to the reasonable or other value or agreed price of the work and materials, except the agreed

age); Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312; Wilson v. Nugent, 125 Cal. 280, 284, 57 Pac. Rep. 1008 (explaining and quoting from Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 51 Pac. Rep. 555); Bryan v. Abbott, 131 Cal. 222, 224, 225, 63 Pac. Rep. 363 (owner and reputed owner; time of payment); Georges v. Kessler, 131 Cal. 183, 185, 186, 63 Pac. Rep. 466 (work and materials); San Pedro L. Co. v. West, 3 Cal. App. 757, 86 Pac. Rep. 993 (contract for all materials for building).

[19] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 380, 51 Pac. Rep. 555. See Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 499.

See "Claim," §§ 361 et seq., ante.

[20] Jones v. Shuey (Cal., April 3, 1895), 40 Pac. Rep. 17.

Utah. But see Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360 (express promise the same as the law implies, no variance).

[21] Nofziger Bros. L. Co. v. Shafer, 2 Cal. App. 219, 220, 83 Pac. Rep. 284.

Arizona. No variance: claim, agreed price; complaint, agreed price; evidence, no specified price: See Wolfley v. Hughes (Ariz., March 20, 1903), 71 Pac. Rep. 951.

price as to part of the work, and the contract is entire, and the evidence shows that, except as to one small item, there was no agreed price for the work;[22] or where the claim states that claimant was to receive the reasonable market value, and the evidence shows a fixed price;[23] or where the claim showed a contract that the claimant was to be paid for the labor done and materials furnished at what they were reasonably worth, to be paid for when the work ceased, and the proof showed an express contract for a fixed amount, and that claimant partially performed, and stopped, owing to the refusal of the owner to pay him;[24] or where the claim shows a contract that claimant was to be paid the reasonable value of the materials furnished, and that an order for the amount due, signed by the original contractor, and indorsed by the owner, was to be delivered to the claimant by the subcontractor upon acceptance of the building, and the proof showed that the materials were bought at a fixed price, and on his own credit, and there was no agreement in regard to an order on the owner, or that claimant was to be paid out of the contract price.[25]

[22] Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195. See Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 499.

[23] Wilson v. Nugent, 125 Cal. 280, 283, 57 Pac. Rep. 1008; Buell v. Brown, 131 Cal. 158, 162, 63 Pac. Rep. 167. See Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 499, attempting to distinguish Wilson v. Nugent, supra, and other cases.

Colorado. Claim and evidence; small difference in amount injuring no one, no variance: Chicago L. Co. v. Newcomb, 19 Colo. App. 265, 74 Pac. Rep. 786. See Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456.

[24] Reed v. Norton, 90 Cal. 590, 595, 26 Pac. Rep. 767, 27 Id. 426. See McClain v. Hutton, 131 Cal. 132, 142, 61 Pac. Rep. 273, 63 Id. 182, 622; Wilson v. Hind, 113 Cal. 357, 359, 45 Pac. Rep. 695 (as to time of payment).

Claim. Extras at no agreed price, upon implied contract; evidence, express contract; variance: Linck v. Johnson, 134 Cal. xix, 66 Pac. Rep. 674.

But in Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 499, where the claim was based on the implied contract, and the evidence showed an express contract, it was held no variance, the court attempting to distinguish Reed v. Norton, supra, and other cases cited, on the ground that in those cases it did not appear that the fixed price was also the market price, and, in the absence of such evidence, the claim would be substantially false and misleading.

[25] Wilson v. Hind, 113 Cal. 357, 359, 45 Pac. Rep. 695. See Reed v. Norton, 90 Cal. 590, 595, 26 Pac. Rep. 767, 27 Id. 426; McClain v. Hutton, 131 Cal. 132, 142, 61 Pac. Rep. 273, 63 Id. 182, 622 (as to time of payment).

§ 845. **Same. Time of payment.** Where the evidence shows that there is no specific agreement as to time of payment, and the claim states that a certain portion of the materials was to be paid for in sixty days, and the finding was that all the materials were to be paid for in that time, there is a variance, as to the terms of the contract, between the claim and evidence and findings.[26]

§ 846. **Same. Nature of labor.** It is a material variance, where the claim leaves it uncertain whether the contract was to erect and furnish materials for one building or two, and the evidence shows that the contract, and the work actually performed, was to raise up and move back and repair two houses, and furnish materials therefor.[27]

§ 847. **Same. Deducting credits and offsets. Amount paid.** The variance has been held material, and also immaterial, where the complaint states that the "amount of the contract price of said lumber and materials furnished as aforesaid is two hundred and forty-four dollars and fifty cents, and that no part thereof has been paid," and the evidence showed that the contract price was four hundred and nineteen dollars and fifty-nine cents, and one hundred and seventy-five dollars had been paid thereon.[28]

[26] McClain v. Hutton, 131 Cal. 132, 142, 61 Pac. Rep. 273, 63 Id. 182, 622. See Wilson v. Hind, 113 Cal. 357, 359, 45 Pac. Rep. 695; Reed v. Norton, 90 Cal. 590, 595, 26 Pac. Rep. 767, 27 Id. 426.

See § 861, post.

[27] Eaton v. Malatesta, 92 Cal. 75, 28 Pac. Rep. 54. See Ward v. Crane, 118 Cal. 676, 678, 50 Pac. Rep. 839.

Compare: Newell v. Brill, 2 Cal. App. 61, 83 Pac. Rep. 76.

See "Nature of Labor," §§ 130 et seq., ante.

Washington. So where the claim set forth as the contract, that "the claimant agreed to furnish the lumber material to be used in the construction, erection, and completion" of a certain building, and the proof showed that the contract was made after the building was commenced, for the lumber for its completion: United States Sav. L. & B. Co. v. Jones, 9 Wash. 434, 37 Pac. Rep. 666.

[28] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 381, 51 Pac. Rep. 555.

But in a later case, in the court of appeals, it was held that where the balance stated to be due in the claim of lien is found by the court to be the amount remaining unpaid, the fact that material of a certain value was furnished, for none of which the claimant was paid, where

§ 848. **Same. Immaterial variances.** The variance has been held to be immaterial in the following cases.

Name of owner or reputed owner. Where the claim states that a certain person is owner and reputed owner, and the evidence shows that such person is the reputed owner only;[29] where the claim states that the materials were furnished to A. & Co., and the evidence shows that they were furnished to A.[30]

§ 849. **Same. Person contracting.** The variance is immaterial where the claim states that the claimants furnished the materials to the contractor, and that they were employed by both the contractor and the owner to furnish the same, and, according to the evidence, that they first agreed to furnish the materials to the owner, and that they were used in the building being erected by the contractor, and for which he purchased them from claimants, and that the contractor, by giving an order for payment on the owner, which was paid by the latter, admitted his liability therefor, no injury having resulted to the owner.[31]

Agency of contractor. Where the claim states that T., as contractor, and as agent for and in behalf of the owner, entered into a contract with plaintiff, and there was evidence of express agency to employ the plaintiff, there is no material variance.[32]

the evidence shows a different amount furnished, upon which payments have been made, does not constitute a variance: Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 498.

See § 850, post.

[29] Kelly v. Lemberger (Cal., Sept. 15, 1896), 46 Pac. Rep. 8. See "Names," §§ 379 et seq., ante.

Colorado. Name of contractor: See Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519 (1883).

Washington. Husband and wife: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 720; Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099.

[30] Tibbetts v. Moore, 23 Cal. 208, 215. See Davis v. Livingston, 29 Cal. 283; Presbyterian Church v. Santy, 52 Kan. 462, 465, 34 Pac. Rep. 974; Brown v. Welch, 12 Hun (N. Y.) 582.

[31] Reed v. Norton, 90 Cal. 590, 596, 26 Pac. Rep. 767, 27 Pac. Rep. 426. See Corbett v. Chambers, 109 Cal. 178, 185, 41 Pac. Rep. 873; Central etc. Co. v. Condon, 67 Fed. Rep. 108.

[32] McIntyre v. Trautner, 63 Cal. 429, 431.

Hawaii. See Allen v. Reist, 16 Hawn. 23.

§ 850. **Same. Contract.**[33] **Date of contract.** The variance is not so material as to be fatal, where the claim states the date of the contract incorrectly, and the evidence shows a difference of two years in the date of the contract.[34]

Interest after maturity. Where the claim set forth that the agreement as to each item fixed payment therefor sixty days after purchase, and if not paid within said time, to draw interest, and the evidence failed to show any agreement as to interest, and the court found that the claim contained a true statement of the demand, it was held to be no variance.[35]

Current market price. Regular market price. Where the claim stated that the terms of the contract were the "current market price," and the testimony showed that the terms were the "regular market price," there is no variance.[36]

§ 851. **Same. Implied contract. Express contract.** It is no material variance, where the claim correctly sets forth an agreement to pay the market or reasonable value, and the evidence also shows a subsequent agreement to pay a fixed price as the ascertained market price or reasonable value.[37]

[33] **Whether the full amount of the contract price is stated with credits,** or the true amount due after deducting credits, is immaterial, provided the facts are correctly stated: Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497. "In this respect the case differs from that of Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 381, 51 Pac. Rep. 555, where there was a false statement of the contract in this respect." The complaint alleged the furnishing of material of the value of $132, on which nothing had been paid, and the proof showed the furnishing of material of the value of $212, on which $80 had been paid.

But see § 847, ante.

[34] Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 568, 42 Pac. Rep. 154 (the terms and conditions of the contract, which are the essential elements contemplated by the statute to be stated, being correctly set forth).

[35] McClain v. Hutton, 131 Cal. 132, 136, 61 Pac. Rep. 273, 63 Id. 182, 622.

[36] Webb v. Kuns (Cal., July 25, 1898), 54 Pac. Rep. 78.

Claim, extra work; no evidence: See Newell v. Brill, 2 Cal. App. 61, 63, 83 Pac. Rep. 76 (amendment of complaint).

[37] San Pedro L. Co. v. West, 3 Cal. App. 757, 86 Pac. Rep. 993.

Where complaint and claim stated that plaintiff was to be paid reasonable sum for any extra work, and it is found that this is true, and, in addition, that plaintiff performed all the extra work mentioned in the complaint, and fully completed the same, and the same

§ 852. **Same. Nature of work.** It is an immaterial variance, where the claim stated that the contract was to do all the work and furnish all the materials necessary to complete all of the plumbing-work of the building, and the evidence showed an agreement to do the gas-fitting and plumbing, there being a close kinship between gas-fitting and plumbing, and no one could be misled thereby.[38]

§ 853. **Pleading and proof.**[39] **Generally.** The technical doctrine of variances of the common law has no application to variances between the pleadings and the proof, or findings, under existing practice; and, under the broad rules of pleading and liberal right of amendment under the California codes, substantial justice is sought, regardless of technical forms; and the actual misleading of the adverse party to his prejudice is the fundamental rule.[40]

was accepted by the defendants (stating the time), and defendants agreed to pay therefor a definite sum, this will sustain the allegations in the complaint, since this is not a finding that the work was done under a contract for an agreed price: Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 380, 51 Pac. Rep. 555. See McClain v. Hutton, 131 Cal. 132, 136, 63 Pac. Rep. 182, 61 Id. 273, 63 Id. 622.

Utah. See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360, 365.

See § 860, post.

[38] Newell v. Brill, 2 Cal. App. 61, 62, 83 Pac. Rep. 76.

See "Nature of Labor," §§ 130 et seq., ante.

Washington. And it is immaterial, where the claim is for material used in the construction and completion of a one-story refrigerating-machine building and boiler-house, and the proof shows that there were two buildings which are substantially one, there being an old boiler-house on the grounds, which was overhauled and rebuilt substantially, and substantially connected with the refrigerator-machine building, there being no chance for mistake as to the identity of the structures: Peterman v. Milwaukee B. Co., 11 Wash. 199, 39 Pac. Rep. 452.

[39] **As to variance between evidence and complaint,** see Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312; Georges v. Kessler, 131 Cal. 183, 185, 186, 63 Pac. Rep. 466 (no variance).

See "Variances," §§ 835 et seq., ante; "Complaint," §§ 670 et seq., ante; "Evidence," §§ 764 et seq., ante.

[40] See **Kerr's Cyc. Code Civ. Proc.,** § 469, and note.

Idaho. Variance between pleadings and proof immaterial, unless adverse party prejudiced: Lewis v. Utah Const. Co., 10 Idaho 214, 77 Pac. Rep. 336.

Washington. Ernst v. Fox, 26 Wash. 526, 67 Pac. Rep. 258; Olson v. Snake River V. R. Co., 22 Wash. 139, 60 Pac. Rep. 156.

Test of departure in pleading: See Childs L. & M. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373 (contract, legal effect, in hæc verba).

Lower contract price shown; no variance: Irby v. Phillips, 40 Wash. 618, 82 Pac. Rep. 931.

§ 854. **Same. Material variances. Contract.** Where the contract alleged in the complaint differs in substance from that proved or found by the court, the variance is fatal.[41]

Agreed price. No price agreed. Or where the plaintiff alleged an express contract at an agreed price, and the evidence showed that there was no agreed price;[42] or that there was a contract for the reasonable value, less than the express price alleged.[43]

§ 855. **Same. Valid, void contract. Contracting directly with owner or agent.** In an action to enforce the lien of a mechanic or material-man, the complaint must show, either that the building was constructed under a valid statutory original contract, or that it was not; and a complaint upon one theory will not support a judgment rendered upon another. So where the complaint is based upon the theory that the statutory original contract was void, and that the claimant dealt directly with the owner, and that he was liable for the whole of their claims, a judgment is not supported, which is based upon findings that these allegations are not true, that the statutory original contract was valid, and that the claimants dealt directly, not with the owner, but with the contractor.[44]

§ 856. **Same. Indefinite contract.** Where the complaint alleged a contract to grade the "south half of Chestnut Street," between certain streets, and the evidence showed a contract between the contractor and certain owners of

[41] Cox v. McLaughlin, 63 Cal. 196, 207.
See "Contract," §§ 798 et seq., ante.

[42] Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195. See Star M. & L. Co. v. Porter (Cal. App., Nov. 24, 1906), 88 Pac. Rep. 497, 499.
See § 851, ante.

[43] Jones v. Shuey (Cal., April 3, 1895), 40 Pac. Rep. 17 (the claim of lien corresponding with the allegations of the complaint).

[44] Reed v. Norton, 99 Cal. 617, 620, 34 Pac. Rep. 333.
But see discussion, "Contract," §§ 689 et seq., §§ 798 et seq., §§ 807 et seq., ante; and "Complaint," §§ 687, 691, 692, 697, 698, ante.
In Parker v. Savage Placer Mining Co., 61 Cal. 348, where the original contract was valid, and the complaint of the subclaimant alleged that the plaintiff performed labor at the special instance and request of the owner, and the proof showed that the plaintiff was employed by the contractor, it was held no variance.

property fronting on "Chestnut — ½ street," that the contractor was to perform the work "in front of the property here represented," and grade the same to the official line and grade, the variance is fatal, the contract proved being too uncertain and indefinite.[45]

§ 857. **Same. Person contracting.** And it is a material variance, where the complaint alleges only that materials were furnished to the contractor, and the proof and findings are that the materials were bought by the owner directly from the plaintiffs.[46]

Agency. Where the complaint alleges one person to be the owner, and that the plaintiff was employed by his agent, and the proof shows that the latter was not the agent of the owner, it is a material variance.[47]

§ 858. **Same. Nature of work.** It is a material variance, where the complaint sets forth a contract whereby plaintiff agreed to furnish the material and erect for defendant a certain building, and the evidence shows that the contract, and the work actually performed, was to raise up, move back, and repair two houses, and furnish materials therefor.[48]

§ 859. **Same. Fund. Contractual indebtedness.** It is a material variance, where a complaint for materials alleges that the balance of the contract price is still in the hands of the owner of the building, and bases the right of the recovery on that ground alone, and the proof shows that there is a mere assumption by the owner of the debt, or his agreement

[45] Rauer v. Fay, 110 Cal. 361, 42 Pac. Rep. 902. See Rauer v. Welsh (Cal., Dec. 10, 1895), 42 Pac. Rep. 904.
See "Contract," §§ 387 et seq., ante; "Description," §§ 399 et seq., ante.

[46] Gibson v. Wheeler, 110 Cal. 243, 245, 42 Pac. Rep. 810. See "Complaint," §§ 692 et seq., ante.
Hawaii. Variance, contract with owner alleged; subcontract proved: Allen v. Reist, 16 Hawn. 23.

[47] Eaton v. Rocca, 75 Cal. 93, 96, 16 Pac. Rep. 529. See Hooper v. Flood, 54 Cal. 218.
See "Complaint," §§ 692 et seq., ante.

[48] Eaton v. Malatesta, 92 Cal. 75, 28 Pac. Rep. 54. See Ward v. Crane, 118 Cal. 676, 50 Pac. Rep. 839.

to pay such debt, which would not create or carry a right of lien.[49]

§ 860. Same. Immaterial variance. It has been held that there is no material variance in the following cases.

Express price. Reasonable value. Where the subclaimant's complaint avers that the owner, through her agent, hired claimants at certain specified wages per day, and the court finds that all the amounts for which the judgment was given were "the reasonable value of said work and materials done and furnished";[50] or where the complaint alleged that the defendant agreed to pay therefor what the materials were reasonably worth, and the proof showed an agreement to pay "the regular market value";[51] or where the complaint alleged a special contract, and that the defendant prevented the performance thereof, and alleged the reasonable value of the work performed, and the evidence and findings showed no special contract.[52]

§ 861. Same. Time of payment. The variance is immaterial, where the complaint, by mistake, alleged that three fourths of the contract price was to be paid during the progress of the work, and the balance thirty-five days after the completion, and the proof and findings showed that one hundred dollars of the contract price was to be paid upon

[49] Gibson v. Wheeler, 110 Cal. 243, 245, 42 Pac. Rep. 810.

[50] Green v. Clifford, 94 Cal. 49, 53, 29 Pac. Rep. 331 (it does not appear whether there was also any finding of a hiring at specified wages).

See § 851, ante.

Montana. Or where the claim stated that "Lewisohn (whose christian name is unknown)" was the owner, and the complaint alleged that a copartnership — said Lewisohn and another — were the owners: Richards v. Lewisohn, 19 Mont. 128, 132, 47 Pac. Rep. 645.

Oregon. As to name of employer, see Osborn v. Logus, 28 Oreg. 302, 38 Pac. Rep. 190, 42 Pac. Rep. 997.

Washington. So the variance is immaterial where the claim states that the husband is the reputed owner, and the proof shows that the property was community property, that being unknown to the claimant at the time of filing the claim: Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186.

[51] Santa Monica L. & M. Co. v. Hege, 119 Cal. 376, 380, 51 Pac. Rep. 555. See preceding sections, this chapter.

[52] Ehlers v. Wannack, 118 Cal. 310, 313, 50 Pac. Rep. 433.

completion, and the balance thirty days after completion, the claim of lien correctly describing the contract.[53]

§ 862. **Same. Subclaimant. Owner's employee.** Where the complaint alleged that the plaintiff was an employee of the original contractor, and the proof showed an express agency of the contractor to employ the plaintiff, it was held that there was no such material variance between the complaint and the proofs as to preclude the enforcement of the lien.[54]

§ 863. **Same. Bond. Signed by principals. Unsigned.** Where, in the body of the complaint, it is averred that the principals executed a bond, and the copy of the bond, which is attached as "Exhibit A," and made part of the complaint, shows that it was not signed by the principals, and the bond offered in evidence was identical with the exhibit, there is not a material variance.[55]

[53] Webb v. Kuns (Cal., July 25, 1898), 54 Pac. Rep. 78, 79.
See §§ 842, 845, ante.
[54] McIntyre v. Trautner, 63 Cal. 429, 431.
[55] Kurtz v. Forquer, 94 Cal. 91, 94, 29 Pac. Rep. 413 (the contract under the bond being strictly joint, and not joint and several, **distinguishing** Sacramento v. Dunlap, 14 Cal. 421, and People v. Hartley, 21 Cal. 585, 82 Am. Dec. 758, and **following** People v. Love, 25 Cal. 520, 530).

CHAPTER XL.

TRIAL AND PRACTICE.

§ 864. Practice. In general.
§ 865. Amendment. Express and implied contract.
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§ 867. Same. Description of property.
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§ 881. Same. Time of filing claim.
§ 882. Same. Excessive claim. Forfeiture.
§ 883. Same. Admission in answer. Contract.
§ 884. Same. Common counts. Express contract.

§ 864. Practice. In general.[1] With regard to rules of practice in mechanic's-lien cases, section eleven hundred and

[1] **Continued practice.** Constant and uniform procedure continued by the courts for a long time are strongly presumptive that the practice is correct: Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 20 Pac. Rep. 419.

Defaults. Relief from. Wide discretion. Under **Kerr's Cyc. Code Civ. Proc.**, § 473, a wide latitude of discretion is vested in courts of original jurisdiction in relieving parties from default in the performance of acts, where such default tends to obstruct a hearing of pending actions, and where the exercise of such discretion is to accord litigants a trial upon the merits, the abuse must clearly appear: Klokke v. Raphael (March 27, 1908), 6 Cal. App. Dec. 508, 96 Pac. Rep. 392.

Estoppel by stipulation to take deposition: Palmer v. Uncas M. Co., 70 Cal. 614, 616, 11 Pac. Rep. 666.

Specifications of particular errors of law on which appellant will rely are not necessary in a bill of exceptions. So of improper exclusion of evidence: Hagman v. Williams, 88 Cal. 146, 151, 25 Pac. Rep. 1111. So as to the ground that the finding or decision is not supported by the evidence: Snell v. Payne, 115 Cal. 218, 220, 46 Pac. Rep. 1069.

ninety-eight[2] provides: "Except as otherwise provided in this chapter,[3] the provisions of part two of this code are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter." Only those rules peculiar to or specially illustrating proceedings in mechanic's-lien cases will be considered in this title. Principles of general application decided in mechanic's-lien cases, here considered for the sake of completeness, will be relegated to the notes.

Estoppel. As to attorneys' fees, see Rapp v. Spring Valley G. Co., 74 Cal. 532, 534, 16 Pac. Rep. 325.

Default: See "Judgment," §§ 903 et seq., post.

Fictitious defendants. Dismissal. In a suit to enforce a lien against the owner, the contractors, and several fictitious defendants, and the owner only was served and appeared, and no disposition of the case was made as to those not appearing, and no objection was made in the court below to proceeding with the trial of the cause, the court may, under § 579 of the Code of Civil Procedure, give judgment against the owner without determining the liability of the other defendants: Kelley v. Plover, 103 Cal. 35, 36, 36 Pac. Rep. 1020.

Granting motion to strike out matter upon which cause of action not based: See Gilliam v. Brown, 126 Cal. 160, 163, 58 Pac. Rep. 466.

Stay of proceedings; bankruptcy proceedings: See In re Grissler, 136 Fed. Rep. 754, 69 C. C. A. 406.

Colorado. Decree making claim of receiver a lien on property: See Bassick M. Co. v. Schoolfield, 15 Colo. 376, 24 Pac. Rep. 1049.

Idaho. Continuance, discretionary; ruling not reversed, except for abuse: See Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218.

Nevada. Dismissal with relation to interveners: Elliott v. Ivers, 6 Nev. 287.

New Mexico. Where adult defendants have the suit to foreclose liens dismissed as to certain other defendants, minors, the former are liable to pay the entire debt: Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

Dismissal: Newcomb v. White, 5 N. M. 435, 23 Pac. Rep. 671.

Oregon. See Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Pac. Rep. 190, 42 Pac. Rep. 997, for a number of points of practice fully discussed; Capital L. Co. v. Ryan, 34 Oreg. 73, 54 Pac. Rep. 1093.

Preference in calendar applies only to the trial in the circuit court: See Falconio v. Larsen, 31 Oreg. 137; and not on appeal: Hand Mfg. Co. v. Marks, 36 Oreg. 523, 53 Pac. Rep. 1072.

Washington. Reference to referee: See Wheeler v. Ralph, 4 Wash. 617, 30 Pac. Rep. 709.

Objections against parties having prior claims on fund: See Munroe v. Sedro L. & S. Co., 16 Wash. 694, 48 Pac. Rep. 405.

Failure to serve cross-complaint; dismissed on rehearing, notwithstanding recital of decree and findings: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712, 721.

Tender as admission of amount due: See Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 139, 421.

Cost of claim of lien not demandable on tender before suit: Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 421.

Reasonable attorneys' fees stipulated at trial; no evidence: See Greene v. Finnell, 22 Wash. 186, 60 Pac. Rep. 144.

[2] **Kerr's Cyc. Code Civ. Proc.,** § 1198.

[3] **Kerr's Cyc. Code Civ. Proc.,** §§ 1183-1203a.

§ 865. **Amendment.**[4] **Express and implied contract.** The complaint in an action to enforce a contractor's lien, in which a special contract between the contractor and the owner was stated, can be changed, by amendment, into an action on the contract, which contract may be counted on specially, or the common counts in assumpsit, in certain cases, may be used, the general rules applicable to which have already been indicated.[5]

§ 866. **Same. Modification of contract.** Where the complaint alleges a modification of the contract, the answer need not set it up; and where the plaintiff strikes out such allegation by amendment after resting, the defendant may avail himself of proof of such modification, and amend his answer to conform to the proof.[6]

[4] See "Appeal," § 956; "Description," §§ 399 et seq., ante.

Amendment to answer: See Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 240, 29 Pac. Rep. 629.

Amendment to conform to proof of extent of lien: See "Decree," §§ 903 et seq., post.

Amendment affecting injunction: See §§ 645 et seq., ante.

Relation of amendment to commencement of action: See §§ 649 et seq., ante.

Complaint in action on express contract; prevention of performance; amendment to quantum meruit: See Cox v. McLaughlin, 76 Cal. 60, 63, 18 Pac. Rep. 100, 9 Am. St. Rep. 164.

Amendment of complaint as to notice to owner: See Weldon v. Superior Court, 138 Cal. 427, 71 Pac. Rep. 502.

Montana. Amendment of answer: See A. M. Holter H. Co. v. Ontario M. Co., 24 Mont. 184, 61 Pac. Rep. 3.

Washington. Appellate court treating pleading as amended; satisfaction of superintendent: See Lang v. Crescent Coal Co. (Wash., Nov. 1, 1906), 87 Pac. Rep. 261.

[5] Castagnino v. Balletta, 82 Cal. 250, 256, 23 Pac. Rep. 127.

See "Common Counts," §§ 673 et seq., and §§ 638 et seq., ante.

Arizona. Amendment to complaint; review: O'Connor v. Adams, 6 Ariz. 404, 59 Pac. Rep. 105.

Colorado. Amendment not changing cause of action of contractor to that of subcontractor: See Harris v. Harris, 18 Colo. App. 34, 69 Pac. Rep. 309, s. c. 9 Colo. App. 211, 47 Pac. Rep. 841.

Making new cause of action (notes): Davis v. Johnson, 4 Colo. App. 545, 36 Pac. Rep. 887.

[6] Flinn v. Mowry, 131 Cal. 481, 485, 63 Pac. Rep. 724, 1006.

Amended complaint, alleging changes made in conformity with contract, not constituting new or different cause of action: See People's L. Co. v. Gillard (Cal. App., June 20, 1907), 90 Pac. Rep. 556, s. c. 136 Cal. 55, 57, 68 Pac. Rep. 576.

Washington. Amendment of complaint to correspond with proof showing smaller contract price, when alleged: See Irby v. Phillips, 40 Wash. 618, 82 Pac. Rep. 931.

§ 867. Same. Description of property. Where, in an action to enforce liens upon a building, the building is shown to be upon more land than is described in the complaint, but the claim of lien is sufficient to embrace the entire building, the court should direct an amendment to be made to the complaint, so that it may conform to the proofs.[7]

§ 868. Same. Relation of amendment to time of commencing action. Where an amendment, based upon the same cause of action, is made to the complaint, it relates back to the date upon which the original complaint was filed, with reference to the time of commencing the action to foreclose the lien.[8] An amendment to the complaint, by a materialman, to foreclose a lien for material furnished to the contractor, making the contractor a party, after the statutory time for commencing the action has passed, does not prejudice the owner of the premises, because the contractor is not a necessary party to the action.[9]

§ 869. Consolidation of actions.[10] Section eleven hundred and ninety-five[11] provides that "when separate actions are commenced, the court may consolidate them."[12]

[7] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 211, 29 Pac. Rep. 633. See §§ 399 et seq., ante.

Colorado. See Martin v. Simmons, 11 Colo. 411, 18 Pac. Rep. 535.

[8] White v. Soto, 82 Cal. 654, 656, 23 Pac. Rep. 210.

[9] Green v. Clifford, 94 Cal. 49, 52, 29 Pac. Rep. 331. See White v. Soto, 82 Cal. 654, 656, 23 Pac. Rep. 210; Casserly v. Waite, 124 Mich. 157, 161, 82 N. W. Rep. 841, 83 Am. St. Rep. 320.

See "Time of Commencing Action," §§ 649 et seq., ante; also note 7 Am. & Eng. Ann. Cas. 947.

[10] **Consolidated action; single action:** See Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1080.

See "Intervention," §§ 873 et seq., post.

Various cases of consolidation of actions: Palmer v. Uncas M. Co., 70 Cal. 614, 11 Pac. Rep. 666; Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 25 Pac. Rep. 124; Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. Rep. 164; Petersen v. Shain (Cal.), 33 Pac. Rep. 1086.

Consolidation on appeal: See Valley L. Co. v. Struck, 146 Cal. 266, 80 Pac. Rep. 405.

Colorado. Consolidation of actions: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 53.

Montana. Consolidation ordered where the parties are the same in each suit, and the subject-matter such as may be joined: Mason v. Germaine, 1 Mont. 267 (1865).

[11] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

[12] **As to attorneys' fees in each action,** see §§ 935 et seq., post.

Trial after consolidation. A plaintiff is not entitled to a separate trial of the respective claims of plaintiffs in the consolidated action;[13] and, after the consolidation, the actions should be tried as a single action by the respective plaintiffs against the defendants.[14]

Findings. The decision of the court should be embodied in a single set of findings, after the actions have been consolidated.[15]

§ 870. Same. Rights of claimants against one another. Upon the consolidation of two or more actions to foreclose

An early statute required that every lien on the same property should be litigated and enforced in the same action, and it was held that every suit brought to enforce a particular lien must be regarded as a proceeding to enforce all the liens against the same property: Mars v. McKay, 14 Cal. 127, 129 (1855).

Washington. Prior to act of 1893: See Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186; Harrington v. Miller, 4 Wash. 808, 31 Pac. Rep. 325 (and the court, it was held, could segregate some of the actions after consolidation, and proceed with the others to final judgment, and likewise, subsequently, with the segregated actions).

Consolidation of actions: See Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

Power to consolidate actions inherent in courts of equity: Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

[13] Curnow v. Happy Valley B. G. & H. Co., 68 Cal. 262, 263, 9 Pac. Rep. 149.

[14] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 232, 29 Pac. Rep. 629.

Washington. "In consolidated cases, each case should be treated on its merits, as if it stood alone. The rules of evidence are the same, whether cases are tried separately or together, and no incompetent evidence is admissible. The parties in one of several consolidated cases ought not to be deprived of any legal right by reason of the introduction of proper evidence in another case, simply because the two are tried together. The object of the legislature in providing for the consolidating of these lien cases was to facilitate the trial and avoid unnecessary expenses, and not to deprive a worthy class of litigants of any rights or privileges they would have if their actions were brought separately": Harrington v. Miller, 4 Wash. 808, 813, 31 Pac. Rep. 325.

Where owner party to only some of consolidated actions, but appeared on the trial of the consolidated actions, she was held bound by the decree in the consolidated action: Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186 (statute prior to act of 1893).

[15] Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 232, 29 Pac. Rep. 629.

See **Kerr's Cyc. Code Civ. Proc.,** § 1194, and note, declaring the rank of liens in the judgment; and see "Findings," §§ 885 et seq., and "Decree," §§ 903 et seq., post.

Mere fact that court makes separate findings in each case is not sufficient ground for reversal: Marble L. Co. v. Lordsburg Hotel Co., 96 Cal. 332, 333, 31 Pac. Rep. 164.

mechanics' liens, the plaintiffs become actors in the suit against one another, as well as against the owner, and each is entitled to reduce or avoid the lien of any of the others by any evidence that would have that effect.[16]

§ 871. **Deposit of money in court.** The owner of the building, after its completion by the contractor, holds the money reserved as required by section eleven hundred and eighty-four [17] for payment to the contractor or lien claimant, whichever is entitled to it; and if there is a contest between them, he should deposit the money in court, to be paid to the party adjudged to be entitled to it.[18]

§ 872. **Same. Payment of balance of fund.** The remainder of the fund due from the owner to the contractor after payment of liens cannot be ordered by the court to be distributed to those who are entitled only to a money judgment against the contractor, but should be ordered to be paid to the contractor.[19] But where the fund is deposited in court, and the parties are required to interplead concerning it, it has been held that the remainder may be distributed to one of the parties so interpleaded, if he is entitled to it, although he may have no lien upon the fund.[20]

§ 873. **Intervention.**[21] **Effect of.** Intervention in a suit already pending, if filed within the time prescribed by law,

[16] Kennedy & S. L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

[17] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[18] De Camp L. Co. v. Tolhurst, 99 Cal. 631, 635, 34 Pac. Rep. 438.

[19] Kennedy & S. L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336; Kennedy & S. L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008. See "General Creditors," §§ 601 et seq., ante.

[20] Board of Education v. Blake (Cal., Dec. 3, 1894), 38 Pac. Rep. 536. This case was one of garnishment upon a board of education, which was ineffectual, and the board interpleaded a general creditor having no lien upon the fund, a creditor who had a lien by service of notice under § 1184 of the Code of Civil Procedure, and the contractor; but the decision was based expressly upon the ground that the board had interpleaded the parties respecting the fund.

[21] See "Consolidation," §§ 869 et seq., ante.

As to general principles of intervention, see **Kerr's Cyc. Code Civ. Proc.,** § 387, and note.

Montana. Summons necessary on order to bring parties in: Mason v. Germaine, 1 Mont. 273 (1865).

is as much a compliance with the act as an original suit; and the effect is the same as if an original suit had been commenced; but if the intervener fails to connect himself with the original suit before his lien expires, he cannot take advantage of the pendency of the original suit.[22]

§ 874. Same. Right to intervene. In a suit to enforce a mechanic's lien on a ditch, the mortgager of the ditch, subsequently to the lien, has no absolute right of intervention, and where a suit has been pending for some time, and the application to intervene was made just as the plaintiff was taking judgment, the application was properly refused, and in such case, if the intervener has a valid claim, it is still in

Intervention: See Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678.

Utah. Intervention; practice: Elwell v. Morrow, 28 Utah 278, 78 Pac. Rep. 605.

Washington. Consent of the other parties to the suit is necessary in order that a pendente lite assignee of a mechanic's lien may intervene in a foreclosure suit, and supplemental pleadings required: Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712 (under Ballinger's Ann. Codes and Stats., § 4824, the party in interest; and § 4958, supplemental pleadings).

Intervention: See Lavanway v. Cannon, 37 Wash. 593, 79 Pac. Rep. 1117.

Claimants intervening after suit commenced: See Lavanway v. Cannon, 37 Wash. 593, 79 Pac. Rep. 1117, 1119.

[22] Mars v. McKay, 14 Cal. 127, 129 (under § 7, act of April 27, 1855, Stats. 1855, p. 157, similar to § 1190, **Kerr's Cyc. Code Civ. Proc.**, as to commencing suit; the former, however, allowing six months and extensions of time, and the latter ninety days only, after the filing of the claim): See De Camp L. Co. v. Tolhurst, 99 Cal. 631, 633, 34 Pac. Rep. 438. See Tibbetts v. Moore, 23 Cal. 208, 214 (under act of April 19, 1856, Stats. 1856, p. 203, § 7, as amended by act of April 22, 1858, Stats. 1858, p. 225, and act of 1861, which provided for special notice to be published upon the filing of the petition requiring claimants on a certain day to exhibit proof of their liens, the proceeding being special). Likewise: Van Winkle v. Stow, 23 Cal. 457, 461 (Stats. 1861, p. 495). Under the peculiar procedure required by the act, it was held that it was not the intent of the legislature that there should be intervention by a mortgagee in such special proceeding.

Nevada. Under act of 1875, interveners were connected with the proceeding to foreclose the plaintiff's lien, by force of the statute, when the action was commenced and notice thereof published. No formal petition or order of court was required: Hunter v. Truckee Lodge, 14 Nev. 29; Elliott v. Ivers, 6 Nev. 290. The former case criticizes Mars v. McKay (Cal.), supra.

Oklahoma. Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303.

Oregon. But see Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454, **citing** Mars v. McKay, supra.

his power to assert it, the decree, of course, binding only the parties to the action.[23]

§ 875. Jury trial.[24] An action to foreclose a mechanic's lien being equitable in its nature,[25] a party to the action is not entitled, as a matter of right, to a jury trial; but, under

[23] Hocker v. Kelley, 14 Cal. 164. See note to preceding section.

Colorado. Any person whose interest, when disclosed, requires it, may be made a party, pending proceedings prior to final decree: Snodgrass v. Holland, 6 Colo. 596. But as to parties whose rights accrued after suit brought, see Cornell v. Conine-Eaton L. Co., 9 Colo. App. 225, 47 Pac. Rep. 912; Fischer v. Hanna, 8 Colo. App. 471, 47 Pac. Rep. 303.

Washington. "Under our statute, there is no reason why other liens than those of mechanics and material-men cannot be joined in an action for the foreclosure of such liens, if, in the opinion of the trial court, the convenience and interests of all parties demand such joinder. All the liens relate to the same subject-matter, and suits thereon seek a common remedy; that is, to have the property sold in satisfaction thereof, and bear such relations to each other as to come within the provisions of our statute as to intervention": Washington R. P. Co. v. Johnson, 10 Wash. 445, 448, 39 Pac. Rep. 115.

[24] **Instructions to jury;** verbal alterations of contract: See Gilliam v. Brown, 116 Cal. 454.

Colorado. Instruction as to bad faith, no issue thereon being made: See San Miguel Consol. G. M. Co. v. Stubbs (Colo., April 1, 1907), 90 Pac. Rep. 842, 844.

Instructions conflicting; "heart of yellow pine"; sample: See San Miguel Consol. G. M. Co. v. Stubbs (Colo., April 1, 1907), 90 Pac. Rep. 842, 844.

Idaho. Instruction; counterclaim for damages for delay: See American B. Co. v. Regents of University, 11 Idaho 163, 81 Pac. Rep. 604, 611.

Montana. Instruction; cancelation of contract: Wortman v. Montana Cent. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

Oklahoma. Exception to instruction: See Harness v. McKee-Brown L. Co. (Okl., Feb. 13, 1907), 89 Pac. Rep. 1020.

Washington. Instruction as to time of completion of contract; damages; conditions surrounding performance: See Anderson v. Hilker, 38 Wash. 632, 80 Pac. Rep. 848.

Exception to instruction; "substantial performance"; "substantial failure to perform": See Anderson v. Harper, 30 Wash. 378, 70 Pac. Rep. 965.

Instruction; agency; knowledge of principal: See Novelty M. Co. v. Heinzerling, 39 Wash. 244, 81 Pac. Rep. 742.

Instruction as to agency in superintending work: See Novelty M. Co. v. Heinzerling, 39 Wash. 244, 81 Pac. Rep. 742.

Instruction; comment by court on evidence: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

Instructions not excepted to, binding: See Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. Rep. 301.

[25] See § 9, and §§ 638 et seq., ante.

Colorado. Under Rev. Stats., ch. liv, 427, the chancery practice was observed: Clear Creek M. Co. v. Root, 1 Colo. 374.

the code, in such case, granting or refusing the demand for a jury trial is entirely within the discretion of the court.[26]

§ 876. **Same. Verdict. Setting aside verdict.** In an action to foreclose a mechanic's lien, the court may properly set aside a judgment entered on the verdict of the jury, where it appears that it had been inadvertently entered by the clerk without judicial sanction, when other issues of fact remain to be determined by the court, and the court may proceed with the trial of such issues, and may adopt an advisory verdict of the jury upon the special matter therein involved, make findings as to the other issues, and have a new judgment entered.[27]

§ 877. **New trial.** An express limitation of the ground upon which an order granting a defendant a new trial was made is as to the insufficiency of the claim of lien, and prevents the defendant from contending that the order might have been granted upon the ground that the evidence was insufficient to support the findings.[28]

[26] Curnow v. Happy Valley B. G. & H. Co., 68 Cal. 262, 264, 9 Pac. Rep. 149.

See §§ 869 et seq., ante.

Idaho. Jury trial allowable where there is a demand for damages in cross-complaint or counterclaim, at law: See Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218.

Montana. Jury discretionary in action to foreclose lien: Mochon v. Sullivan, 1 Mont. 470; Simonton v. Kelly, 1 Mont. 483.

Washington. Wheeler v. Ralph, 4 Wash. 617, 630, 30 Pac. Rep. 709. See Installment etc. Loan Co. v. Wentworth, 1 Wash. 467, 25 Pac. Rep. 298. The interposition of a legal defense, such as damages for breach of contract, did not give a right to a jury trial: Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. Rep. 327.

[27] Cummings v. Ross, 90 Cal. 68, 72, 27 Pac. Rep. 62.

Idaho. The court may set aside the verdict: Idaho & O. L. Co. v. Bradbury, 132 U. S. 509, bk. 33 L. ed. 433, 10 Sup. Ct. Rep. 177.

[28] McGinty v. Morgan, 122 Cal. 103, 54 Pac. Rep. 392.

New trial. Section 1190 of the Code of Civil Procedure makes the provisions of Part II, § 656, same code, generally applicable: See Townley v. Adams, 118 Cal. 382, 50 Pac. Rep. 550.

A new trial is properly granted in an action by the contractor, when the trial court refuses to continue the trial until the cases pending for the foreclosure of subclaimants' liens, pleaded in the answer, have been determined: Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449.

See **Kerr's Cyc. Code Civ. Proc.**, §§ 656, 1190, and notes.

§ 878. **Nonsuit. When sustained upon appeal.** The action of the trial court in granting a nonsuit will be sustained upon appeal, no matter whether the proper grounds were stated by the moving party or not, where any valid ground for sustaining such action can be seen by the appellate court.[29]

§ 879. **Same. When not granted.** Where there is a conflict in the evidence, if there is any evidence tending to sustain the plaintiff's case, the motion for a nonsuit should not be granted.[30] Thus —

Void contract. Where the conflict relates to the terms of the contract upon which the action is brought, and as to its validity, for the purpose of the motion, the court has no right to assume that there were provisions in the contract which made it void.[30]

For a general statement as to the method of procedure on motion for a new trial, see Williams v. Hawley, 144 Cal. 97, 99, 77 Pac. Rep. 762.

Statement on motion for new trial; specifications of insufficiency of evidence: See American Type F. Co. v. Packer, 130 Cal. 459, 461, 62 Pac. Rep. 744.

Order for new trial; laying sidewalk: See Flinn v. Mowry, 131 Cal. 481, 487, 63 Pac. Rep. 724, 1006.

New trial granted; lien for street-improvement: See Flinn v. Mowry, 131 Cal. 481, 487, 63 Pac. Rep. 724, 1006.

Order granting new trial; attorneys' fees: See Hooper v. Fletcher, 145 Cal. 375, 379, 79 Pac. Rep. 418.

Appeal from order denying new trial; what considered: See Schroeder v. Pissis, 128 Cal. 209, 212, 60 Pac. Rep. 758.

What considered upon appeal from order granting new trial; no specification of insufficiency of evidence; request of owner; satisfaction of superintendent of streets; lien of assignee of contract: See De Haven v. McAuley, 138 Cal. 573, 575, 72 Pac. Rep. 152.

Colorado. See Bradbury v. Butler, 1 Colo. App. 430, 29 Pac. Rep. 463.

Right to lien: Bradbury v. Butler, supra.

Reopening case without notice to subsequent encumbrancers: See Sprague I. Co. v. Mouat L. & I. Co., 14 Colo. App. 107, 60 Pac. Rep. 179, 184.

Montana. See Bardwell v. Anderson, 18 Mont. 528, 46 Pac. Rep. 443.

Washington. Vacation of judgment and entry of new judgment, on motion for new trial: See Griffith v. Maxwell, 19 Wash. 614, 54 Pac. Rep. 35, s. c. 20 Wash. 403, 55 Pac. Rep. 571.

[29] Snell v. Payne, 115 Cal. 218, 222, 46 Pac. Rep. 1069.

Arizona. Directed verdict; cause of action not stated: See McPherson v. Hattich (Ariz., March 30, 1906), 85 Pac. Rep. 731.

[30] Pacific Mut. L. Ins. Co. v. Fisher, 109 Cal. 566, 569, 42 Pac. Rep. 154.

§ 880. **Same. Statute of limitations.** When the statute of limitations is pleaded as to the first two counts of the complaint, and not pleaded as to a third count, upon a motion for nonsuit upon the ground that the "claim" is barred by the statute, such objection cannot be urged. The word "claim," used in the grounds of the motion, includes the whole claim set forth in the three counts of the complaint, and the action in its entirety should not be held to be barred.[31]

§ 881. **Same. Time of filing claim.** Where certain work may not have been contemplated by the contract, if it nevertheless appears that it was done under the direction of the agent of the owner, and the obligations of the contractor to the owner were not extinguished until certain débris were removed, there is some evidence tending to show that the work was not actually completed, for the purpose of filing the lien, and a nonsuit for failure to file the claim of lien in time should not be granted, even where such evidence consists largely of conclusions introduced without objection on that ground.[32]

§ 882. **Same. Excessive claim. Forfeiture.** And where the motion for nonsuit was made upon the ground that plaintiff "knowingly and wilfully filed a notice of lien for more than he was entitled to, and sought in the action to recover an amount in excess of the amount actually due," it does not state a ground of forfeiture, as wilfully including in his notice to the owner material not furnished for the property, as set forth in section twelve hundred and two,[33] and the motion for nonsuit could not, therefore, properly be granted.[34]

[31] Castagnino v. Balletta, 82 Cal. 250, 262, 23 Pac. Rep. 127.

[32] Gordon H. Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 622, 25 Pac. Rep. 125.

[33] **Kerr's Cyc. Code Civ. Proc.**, § 1202.

[34] Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 366, 27 Pac. Rep. 743 (the motion was not sufficient, whether aimed at the notice or claim. The language of the opinion, however, is not very clear upon this point).

§ 883. Same. Admission in answer. Contract. A nonsuit should not be granted, where there is an admission in the answer as to the making of the contract, and the plaintiff does not offer evidence as to the terms of the contract, or evidence to show that there was any contract.[35]

§ 884. Same. Common counts. Express contract. Where the evidence tends to show that the architect accepted the building, and all conditions precedent have been complied with by plaintiff, and the amount due alone remained to be paid, in an action upon the common counts, where the special contract is offered in evidence, a nonsuit should not be granted for a disagreement between the allegations and the proof.[36]

Agreed price. But where the complaint and claim of lien averred an agreed price for the work, and the evidence showed that, except as to one small item, there was no agreed price, a nonsuit should be granted, as this shows a failure to comply with a statutory requisite.[37]

[35] Schmid v. Busch, 97 Cal. 184, 187, 31 Pac. Rep. 893.

[36] Castagnino v. Balletta, 82 Cal. 250, 259, 23 Pac. Rep. 127.

See "Complaint," §§ 672 et seq., ante; "Variances," §§ 836 et seq., ante.

[37] Wagner v. Hansen, 103 Cal. 104, 107, 37 Pac. Rep. 195.

CHAPTER XLI.

FINDINGS.

§ 885. Findings. Scope of chapter.
§ 886. Issues to be found upon.
§ 887. Finding to cover entire issue.
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§ 889. Ultimate facts to be found.
§ 890. Immaterial issues.
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§ 894. Findings in consolidated action.
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§ 896. Same. Void contract.
§ 897. Findings sufficient to support judgment.
§ 898. Agency.
§ 899. Same. Insufficient finding.
§ 900. Same. Request of owner.
§ 901. Same. Void contract.
§ 902. When findings may not be attacked.

§ 885. Findings.[1] Scope of chapter. The subject of findings will not be discussed in detail. Only those rules peculiar to or specially illustrating the matter treated in this work will be referred to, in accordance with the general plan

[1] See "Demurrer," §§ 728 et seq., ante; "Evidence," §§ 764 et seq., ante; "Practice. In General," §§ 864 et seq., ante; "Variances," §§ 835 et seq., ante.

The provision of § 634, that findings may be waived by the several parties to an issue, includes all parties, and applies to infants, as well as to adults: Western L. Co. v. Phillips, 94 Cal. 54, 56, 29 Pac. Rep. 328.

See **Kerr's Cyc. Code Civ. Proc.,** § 634, and note.

As to extent of land for convenient use and occupation, see "Complaint," §§ 717 et seq., ante.

As to finding upon mistakes in claim, and bona fide purchasers, see **Kerr's Stats. and Amdts. 1906-07,** Code Civ. Proc., § 1203, p. 482; and §§ 412 et seq., ante.

Findings upon consolidation: See §§ 869 et seq., ante.

Presumptions in favor of findings, appeal: See § 976, post.

Washington. Findings of fact and law held not necessary in an equitable action to foreclose lien: Kilroy **v.** Mitchell, 2 Wash. 407, 26 Pac. Rep. 865.

of treatment of pleadings and practice already adverted to in the chapter on complaint.[2]

§ 886. **Issues to be found upon.** The court should find upon all the material issues.[3] Thus —

Proper defense. Notice of action. In an action upon a bond, where the answer denied that the plaintiff properly defended the actions brought to foreclose liens of subclaimants, and also denied that the defendants had any notice of the pendency of these actions, the issues were material, and should have been passed upon.[4]

Liens paid by owner. In a suit to foreclose a contractor's lien, there should be findings as to the issue of the moneys alleged to be paid to the subclaimants upon valid liens by the owner in consideration of an assignment of such subliens.[5]

Priorities. The fact of want of notice of a prior unrecorded mortgage should be found, to give priority over it to a subsequent mechanic's lien.[6]

Use of materials. The findings must show, in an action to foreclose a material-man's lien, that the materials were furnished to be used in the building, and were actually so used.[7]

[2] See § 670, ante.

Fixture as part of building; finding: See Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

As to fixtures as appurtenances, see **Kerr's Cyc. Civ. Code,** § 660, note pars 3-148.

Wyoming. Finding properly identifying land and house: See Big Horn L. Co. v. Davis, 14 Wyo. 455, 85 Pac. Rep. 1048, 84 Id. 900.

[3] **Failure to find upon material issue is error:** Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 288, 65 Pac. Rep. 578 (agency; before amendment of 1907 to **Kerr's Cyc. Code Civ. Proc.,** § 1183).

Idaho. Necessary for court to find amount of land necessary for convenient use and occupation, and may call witnesses therefor: See Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218, 222.

[4] Ernst v. Cummings, 55 Cal. 179, 183.

[5] Shaw v. Wandesford, 53 Cal. 300, 301. See Billings v. Everett, 52 Cal. 661; Baggs v. Smith, 53 Cal. 88; O'Connor v. Frasher, 53 Cal. 435; Taylor v. Reynolds, 53 Cal. 686; Mahoney v. Braverman, 54 Cal. 565, 571; Knight v. Roche, 56 Cal. 15, 25.

[6] Root v. Bryant, 57 Cal. 48, 49.

[7] Patent Brick Co. v. Moore, 75 Cal. 205, 211, 16 Pac. Rep. 890. See Holmes v. Richet, 56 Cal. 307, 310, 38 Am. Rep. 54; Silvester v. Coe Quartz M. Co., 80 Cal. 510, 513, 22 Pac. Rep. 217; Bewick v. Muir, 83 Cal. 368, 370, 23 Pac. Rep. 389, 83 Cal. 373, 23 Pac. Rep. 390; Gordon H. Co. v. San Francisco & S. R. R. Co., 86 Cal. 620, 25 Pac. Rep. 125; Cohn v. Wright, 89 Cal. 86, 88, 26 Pac. Rep. 643; Roebling Sons Co. v. Bear

Promise to pay. Money due. In an action by the owner's laborers, the court must find upon the express promise to pay alleged, and that a sum of money was due and unpaid at the commencement of the action.[8]

Performance. Substantial performance of the original contract should be found as a fact, to sustain the judgment for the contract price, less damages for failure to perform the contract, in favor of the contractor.[9]

Void contract. Value. In an action by subclaimants under a void statutory contract, there should be a finding as to the value of the labor done and materials furnished.[10]

§ 887. **Finding to cover entire issue.** The finding of the court should cover the whole of the issue.[11] Thus —

Date of completion. A finding that a building was completed "on or about" a date specified in the answer is insufficient to cover the issue as to the date of completion, when it is material to fix the proper time within which to file the claim of lien.[12]

Prevention of performance. A finding that the defendant entirely suspended work under the provisions of the contract is not a finding of prevention of performance.[13]

Valley Irr. Co., 99 Cal. 488, 490, 34 Pac. Rep. 80; Hamilton v. Delhi M. Co., 118 Cal. 148, 153, 154, 50 Pac. Rep. 378; Stimson v. Los Angeles T. Co., 141 Cal. 30, 32, 74 Pac. Rep. 357; Bennett v. Beadle, 142 Cal. 239, 242, 75 Pac. Rep. 843; Tabor v. Armstrong, 9 Colo. 285, 289, 12 Pac. Rep. 157; Hill v. Bowers, 45 Kan. 592, 593, 26 Pac. Rep. 13; The James H. Prentice, 36 Fed. Rep. 782; Gordon v. Canal Co., 1 McAl. C. C. 514, 522.

See notes 64 Am. Dec. 679; 79 Am. Dec. 273.

See also "Appeal," § 980, post.

[8] Bewick v. Muir, 83 Cal. 368, 371, 23 Pac. Rep. 389, 83 Cal. 373, 23 Pac. Rep. 390.

[9] Perry v. Quackenbush, 105 Cal. 299, 306, 38 Pac. Rep. 740.

[10] Booth v. Pendola, 88 Cal. 36, 41, 23 Pac. Rep. 200, 24 Id. 714, 25 Id. 1101.

Idaho. Failure to find upon all material issues: See Sandstrom v. Smith (Idaho, June 20, 1906), 86 Pac. Rep. 416.

Court may approve and adopt findings of jury in suit to foreclose lien, it being an action in equity: Sandstrom v. Smith, supra.

[11] **General principles of construction of findings** set forth: See McClain v. Hutton, 131 Cal. 132, 143, 61 Pac. Rep. 273, 63 Id. 182, 622.

Finding as to completion of building, construed: See Jones v. Kruse, 138 Cal. 613, 616, 72 Pac. Rep. 146.

[12] Cohn v. Wright, 89 Cal. 86, 88, 26 Pac. Rep. 643.

[13] Cox v. McLaughlin, 63 Cal. 196, 206.

Conditional compensation. Where the answer raises an issue that the plaintiff was not to receive any compensation unless the building was erected, which depended upon whether he procured a license for the selling of liquor therein, the building being abandoned by reason of inability to procure such license, and the court finds that there was no agreement between plaintiff and defendants as to the amount to be paid plaintiff, this is not a finding as to the special defense set up, but relates merely to the amount.[14]

Completion of building. Abandonment. Where the claim was filed the day before the completion of the building, and the court finds that prior to the commencement of the action the carpenters finished their work, but that the building " was not then, and is not now, completed," and " that neither of the plaintiffs, at the time of furnishing the materials, knew that it was not the intention " of the owner " to complete the building, and leave it in an unfinished state," the findings are not equivalent to a finding that the original purpose of the owner was to construct the building in part, or that the original purpose to finish it was abandoned.[15]

§ 888. **Same. Defective findings.** A finding is not defective, in failing to show whether improvements made were of such a character that they imposed a lien on the premises under a clause of a lease providing for their removal under certain conditions, referring to the same, where it is found that the additions, alterations, and repairs in question were made to and upon buildings and other structures situated on the leased premises, the finding thus showing that the improvements were upon property which is declared subject to lien by statute, and was sufficient.[16]

§ 889. **Ultimate facts to be found.** Probative facts should not be found; and a finding of probative facts will not generally control, limit, or modify a finding of the ultimate fact; but, when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was

[14] Ehlers v. Wannack, 118 Cal. 310, 314, 50 Pac. Rep. 433.
[15] Schwartz v. Knight, 74 Cal. 432, 435, 16 Pac. Rep. 235.
[16] Evans v. Judson, 120 Cal. 282, 285, 52 Pac. Rep. 585.

found against the evidence, can overcome the principal finding.[17] The ultimate fact, or facts from which the ultimate fact is necessarily deducible, must be found. Thus —

Completion. The ultimate fact of completion, or of trifling imperfection, or of continuance of the work during a certain period, or cessation from work for thirty days, should be found.[18]

Substantial performance. But a finding of trivial defect, such as that some small places in the house were not properly grained and finished, and that the cost of properly finishing them would not be more than five dollars, or that plaintiffs substantially complied with the contract and completed the work, is consistent with a finding that the plaintiff substantially performed his contract.[19]

Invalidity of contract. Where facts are found, showing the invalidity of the statutory original contract, it is equivalent to finding that there was no original contract, and that no labor was done or materials furnished under it.[20]

The issue of damages for breach of a statutory original contract is disposed of by a finding showing the statutory original contract to be void.[21]

[17] Perry v. Quackenbush, 105 Cal. 299, 305, 38 Pac. Rep. 740 (finding of complete performance).

Findings supported by evidence: See Sims v. Petaluma G. L. Co., 131 Cal. 656, 660, 62 Pac. Rep. 300, 63 Pac. Rep. 1011 (due performance; reasonable value); Boothe v. Squaw Springs W. Co., 142 Cal. 573, 576, 76 Pac. Rep. 385 (extras; modification of contract); Union L. Co. v. Simon (Cal. App., March 13, 1906), 89 Pac. Rep. 1077, 1078, 1081 (land for convenient use and occupation; hospital).

Evidence insufficient to support finding; compensation of architect: See Fitzhugh v. Mason, 2 Cal. App. 220, 224, 83 Pac. Rep. 282.

Evidence conflicting; gas plant: See Sims v. Petaluma G. L. Co., 131 Cal. 656, 63 Pac. Rep. 1011, reversing s. c. 62 Pac. Rep. 300.

Montana. Evidence held to support findings: Western I. W. v. Montana P. & P. Co., 30 Mont. 550, 77 Pac. Rep. 413, 417 (single contract on an open continuous account; falling within the rule announced in Helena S. H. & S. Co. v. Wells, 16 Mont. 65, 40 Pac. Rep. 78, and **distinguishing** A. M. Holter H. Co. v. Ontario M. Co., 24 Mont. 184, 61 Pac. Rep. 3).

[18] Marble L. Co. v. Lordsburg H. Co., 96 Cal. 332, 334, 31 Pac. Rep. 164.

[19] Harlan v. Stufflebeem, 87 Cal. 508, 510, 25 Pac. Rep. 686.

[20] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 396, 30 Pac. Rep. 564.

See §§ 319 et seq., ante.

[21] Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 396, 30 Pac. Rep. 564.

See §§ 319 et seq., ante.

Estoppel. And so where the court does not find upon a plea of estoppel as to falsely receipted bills presented to the owner, but finds that the owner did not rely upon the same, it is sufficient.[22]

§ 890. **Immaterial issues.** The court need not find upon immaterial issues, such as a claim for attorneys' fees upon foreclosure of the lien;[23] nor upon issues not made by the pleadings, nor upon an issue rendered immaterial by the findings made upon other issues;[24] nor upon matters outside of the issues.[25]

Contract. A finding of a contract with the owner, not pleaded in an action of a subclaimant under a non-statutory original contract, is outside of the issues.[26]

Amount due. Where the plaintiff, a subcontractor, fails to state that anything was due from the owner to the contractor at the time of filing the claim, or upon notice to the owner, and thus fails to state a cause of action, a finding that the owner had notice was without the issues.[27]

Another action pending. When the answer to the complaint of the contractor in indebitatus assumpsit does not plead another action pending, which had been first brought by the subcontractor of the plaintiff against the defendant to recover for a foundation built pursuant to the contract, a finding that such action was pending is outside of the issues.[28]

[22] Washburn v. Kahler, 97 Cal. 58, 60, 31 Pac. Rep. 741.

[23] Clancy v. Plover, 107 Cal. 272, 274, 40 Pac. Rep. 394.

[24] **Finding outside issues;** offsets and counterclaims for labor and materials of subclaimants: See Gamache v. South School Dist., 133 Cal. 145, 148, 65 Pac. Rep. 301. See Green v. Chandler, 54 Cal. 626.

In a suit to foreclose subcontractor's lien, finding unnecessary as to negligence of contractor in carrying out void original contract by original contractor: See Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

Unnecessary finding need not be supported by the evidence: Union S. M. Works v. Dodge, 129 Cal. 390, 397 (consideration).

Unsupported finding rendered immaterial: Fitzhugh v. Mason, 2 Cal. App. 220, 224, 83 Pac. Rep. 282 (architect's compensation).

No evidence as to fraud introduced; no finding necessary: See Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

[25] So held in reference to notice of non-responsibility under § 1192, **Kerr's Cyc. Code Civ. Proc.** (before amendment of 1907): Buell v. Brown, 131 Cal. 158, 162, 63 Pac. Rep. 167.

[26] Gibson v. Wneeler, 110 Cal. 243, 246, 42 Pac. Rep. 810.

[27] Rosenkranz v. Wagner, 62 Cal. 151, 154.

[28] Griffith v. Happersberger, 86 Cal. 605, 612, 25 Pac. Rep. 137, 487.

Performance. Where evidence as to non-performance of the contract and guaranteeing the performance of the contract was introduced in evidence, but no issue was made as to these facts by the pleadings, a finding thereon would be outside of the issues.[29]

Completion of work. An averment, in the answer, of the date of completion of the work of excavation presents no material issue, where the work of excavating was simply a part of the work under the contract, and requires no finding, when the findings made show that there was no cessation from work, and that the construction of the building was continuously carried on to completion and the liens were filed within the proper time thereafter.[30]

Facts admitted. Where a fact is admitted in the pleadings, a finding thereon is unnecessary, and may be treated as surplusage.[31]

§ 891. **Same. Knowledge of owner. Notice of non-responsibility.** A finding outside of the issues must be disregarded; and when, in a suit to enforce the lien of a miner, the complaint contains no allegation that any building or other improvement was constructed upon the lands owned by a mining company, with its knowledge, a finding that at the time of the contract between the claimant and his employer, and during the time of the performance of the labor, the company had full notice and knowledge of such contract, and of all work done by the claimant thereunder, is outside of the issues made by the pleadings, and under section eleven hundred and ninety-two, a decree foreclosing the lien is not supported thereby.[32] Likewise a finding is outside of the issues, when the complaint alleges a contract made with the owner, through its agent, the employer, who contracted for labor in a mine, and where the finding is applicable to a case

[29] Kelley v. Plover, 103 Cal. 35, 37, 36 Pac. Rep. 1020.

[30] Macomber v. Bigelow, 126 Cal. 9, 13, 58 Pac. Rep. 312.

[31] West Coast L. Co. v. Apfield, 86 Cal. 335, 342, 24 Pac. Rep. 993 (consent of owner).

Finding upon issues, facts admitted, unnecessary: Orlandi v. Gray, 125 Cal. 372, 58 Pac. Rep. 15 (void contract; fraud).

[32] Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 65 Pac. Rep. 578 (under **Kerr's Cyc. Code Civ. Proc.,** before amendment of 1907).

in which there was no contract with the owner in any manner whatsoever, but in which the owner is liable, as a penalty for not giving notice of non-responsibility.[33]

§ 892. **Segregating items of contract price.** Where a contract provided a fixed price for a concrete bulkhead, and also expressly provided that any extra concrete-work in a wall was to be charged for at a certain rate, and the court finds that under it the defendant became indebted to the contractors in a sum certain, the finding is sufficient, without segregating the items for contract price and extra work, and finding specifically as to each.[34]

§ 893. **Contradictory findings.** The findings are not contradictory because stating the date of completion of the building, and also that it was never actually completed, when they show that the work ceased on a certain day and such cessation continued for more than thirty days, which facts constituted a completion, under section eleven hundred and eighty-seven.[35]

Party furnishing materials. Where the court finds that certain materials were furnished to the owner by the claimant, to be used in the construction of a dwelling-house, the finding is consistent with another finding, that they were partly furnished by a third party, and that such third party

[33] Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 288, 65 Pac. Rep. 578 (before amendment of 1907 to § 1192, **Kerr's Cyc. Code Civ. Proc.**).

[34] Gray v. Wells, 118 Cal. 11, 17, 50 Pac. Rep. 23.

[35] Marble L. Co. v. Lordsburg H. Co., 96 Cal. 332, 31 Pac. Rep. 164. **Consistency of findings. As to payment:** Petersen v. Shain (Cal.), 33 Pac. Rep. 1086.

As to performance and guaranty: Gray v. Wells, 118 Cal. 11, 14, 16, 50 Pac. Rep. 23.

As to uncertain and hypothetical findings, and surplusage (performance), see Gray v. Wells, 118 Cal. 11, 17, 50 Pac. Rep. 23.

In a suit by a subcontractor to enforce a lien, a finding that the contractor's work was improperly done, not having been sufficiently objected to, the contractor's right to a lien was not affected by the further finding that he knew at the time he did the work that he was not complying with the original contract: Howe v. Schmidt (Cal., June 22, 1907), 90 Pac. Rep. 1056.

Idaho. Special finding inconsistent with general verdict: Bradbury v. Idaho & O. L. I. Co., 2 Idaho 221, 10 Pac. Rep. 620. See Colorado I. W. v. Riekenberg, 4 Idaho 705, 43 Pac. Rep. 681.

refused to deliver such material until it was paid for, and that thereupon the claimant paid the third party for such material, and furnished it according to their contract with the owner.[36]

Performance of contract. And if the findings show how the contract was performed by plaintiff, and stated facts showing that the contract was substantially complied with, they sufficiently sustain an allegation of full performance, notwithstanding a finding that the contractor had not paid all the bills for work done by his subcontractor, as contemplated by an unnecessary provision of the contract for the prevention of liens on public property, which did not and could not accrue in favor of such subcontractor against the person creating the structure.[37]

§ 894. Findings in consolidated action. Where a number of suits to enforce liens are consolidated, it is better to have only one set of findings in the consolidated suit. Such a course avoids needless repetitions of facts common to all the cases, prevents possible complications and inconsistencies, and is altogether the clearer and more orderly method. The question, however, has been said to be one of good taste and correct method; and the mere fact that the court makes separate findings in each of the cases is not, in itself, a sufficient cause for reversal.[38]

[36] Avery v. Clark, 87 Cal. 619, 628, 25 Pac. Rep. 919, 22 Am. St. Rep. 272.

Place of delivery of materials; proper finding: See Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 78 Pac. Rep. 21.

[37] Griffith v. Happersberger, 86 Cal. 605, 613, 25 Pac. Rep. 137, 487.

Utah. A finding that a contract was performed in all its terms and requirements includes all the conditions and provisions of the contract; and hence is a finding of the fact that there was a compliance with the contract requiring the certificate of the architect that the work was done to his satisfaction: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1009.

[38] Marble L. Co. v. Lordsburg H. Co., 96 Cal. 332, 333, 31 Pac. Rep. 164. In this case there was only one judgment.

See Willamette S. M. L. & M. Co. v. Los Angeles College Co., 94 Cal. 229, 29 Pac. Rep. 629. In this case, separate findings were made in each of four cases, and the practice was hostilely criticized, although there were separate judgments.

See "Consolidation," §§ 869 et seq., ante.

§ 895. **Findings of fact and conclusions of law.** Where the conclusions of law contain an averment that as a conclusion from the preceding findings of fact, "the liens of plaintiffs, and each of them, were not filed within the time required by law," such a statement is not a finding of fact, but is a conclusion of law.[39]

Property operated as one mine. And likewise, while a specific finding that property consisting of several mining claims was operated as a single mine is placed among the conclusions of law, yet it is none the less a finding of fact, and the circumstance of being so placed does not affect its character as such.[40]

§ 896. **Same. Void contract.** With regard to findings, there is a wide difference between a void contract, or contract declared to be void under the law, and no contract; for, in the former case, where there is an agreement between competent parties, there is, ex vi termini, a contract, and where the agreement is in writing, a written contract. Hence where the evidence shows the existence of a contract, the fact, with the facts bearing on its validity, should be found, relegating to the conclusions of law — if the court should be of such opinion — the legal conclusion that it is void, under section six hundred and thirty-three of the Code of Civil Procedure, requiring the facts and conclusions of law to be separately stated. And so where the written contract, specifications, and drawings, signed by all the parties, were produced as evidence from the recorder's office, and were legally unobjectionable, findings that the contract was not

[39] Pierce v. Willis, 103 Cal. 91, 93, 36 Pac. Rep. 1080.

See "Questions of Fact," § 827, and "Questions of Law," § 828, ante.

Conclusion of law misplaced among findings of fact, considered according to its nature: Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74.

Finding that labor performed in a mine "for the development, improvement, protection, and preservation of the said premises," under the circumstances of the case, regarded as a conclusion: See Reese v. Bald Mountain Consol. G. M. Co., 133 Cal. 285, 289, 65 Pac. Rep. 578.

[40] Hamilton v. Delhi M. Co., 118 Cal. 148, 151, 50 Pac. Rep. 378.

reduced to writing and signed by the parties, or filed in the recorder's office, are against the evidence.[41]

§ 897. **Findings sufficient to support judgment.** A general finding, among others, that on a certain date plaintiff, for the purpose of securing and perfecting a lien for the money due upon the land and premises, pursuant to the provisions of the statute, specifically referring to the provisions, filed for record in the office of the recorder of the county where the premises are situated its claim therefor, duly verified, and that such claim of lien is in due form and was filed in due time, and is a valid subsisting claim of lien under the law, seems to be sufficient to uphold a decree enforcing the lien.[42]

Payment. And a finding that a debt was paid by a note, the receipt therefor expressly stating receipt of "payment by note," is sufficiently supported by the receipt.[43]

§ 898. **Agency.** In the absence of counter-proof, the prima facie evidence of agency, by acts under section eleven hundred and eighty-three,[44] — that is, open and continued acts and declarations of any person having charge of the property upon which the labor was done, — is sufficient to support a finding of agency.[45]

§ 899. **Same. Insufficient finding.** A finding that the employer was in possession of a mine, under a contract with the owner, authorizing the former to hold possession, make improvements and prosecute development-work, is not a finding that he was the agent of the owner, within the meaning of section eleven hundred and eighty-three;[46] nor is it

[41] California I. C. Co. v. Bradbury, 138 Cal. 328, 330, 71 Pac. Rep. 328, 617.
[42] Russ L. Co. v. Garrettson, 87 Cal. 589, 596, 25 Pac. Rep. 747.
[43] Jenne v. Burger, 120 Cal. 444, 447, 52 Pac. Rep. 706.
See "Evidence," §§ 764 et seq., ante.
[44] Kerr's Cyc. Code Civ. Proc., § 1183.
[45] Donohoe v. Trinity Consol. G. & S. M. Co., 113 Cal. 119, 124, 45 Pac. Rep. 259.
[46] Kerr's Cyc. Code Civ. Proc., § 1183.

a finding that he was the contractor, subcontractor, architect, or builder of the owner; nor that he was the person having charge of any mining, or the construction, alteration, addition to, or repair of any building or other improvement.[47]

§ 900. **Same. Request of owner.** In a suit to foreclose the liens of subclaimants under a void statutory original contract, and the findings with reference to each of the liens were, that the labor was performed or materials furnished "at the personal instance and request" of the owner, and that the owner "then and there undertook and agreed to pay for the same," in some cases it appearing either in the findings or pleadings that the employment was through the original contractor as agent, but, in general, it not being stated whether the claimant was employed by the owner personally or by the original contractor as the owner's agent, and it is explicitly found in each case that the original contractor was the owner's agent for all the purposes of the building, it is to be inferred that the latter was intended, especially where it is rendered certain by referring to the evidence in the bill of exceptions, even where it does not appear from the findings whether the contractor acted as statutory or merely conventional agent, the findings being equally true, whichever of these two constructions is placed upon them.[48]

§ 901. **Same. Void contract.** Where the pleadings and claim of lien show that the agency of the contractor, in a suit to foreclose a subclaimant's lien under a void statutory original contract, is the statutory agency, and where the findings are indefinite as to whether the agency was statutory, or actual, or ostensible, the findings will be construed to correspond with the pleadings and claim of lien, and will be insufficient to support a personal judgment against the owner.[49]

[47] Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 287, 65 Pac. Rep. 578 (before the amendments of 1903 and 1907 to § 1183, **Kerr's Cyc. Code Civ. Proc.**).

[48] McClain v. Hutton, 131 Cal. 132, 143, 61 Pac. Rep. 273, 63 Id. 182, 622.

[49] McClain v. Hutton, 131 Cal. 132, 143, 61 Pac. Rep. 273, 63 Id. 182, 622.

§ 902. When findings may not be attacked. General creditors, who have themselves no liens upon the property, cannot attack the correctness of the findings as to the liens of others who are claimants.[50] It has been held that the findings cannot be attacked when a nonsuit has been granted,[51] or when the case has been submitted to the court upon an agreed statement of facts.[52]

[50] Kennedy-Shaw L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336. See "General Creditors," §§ 601 et seq., ante; "Appeal," § 982, post.

[51] **Where nonsuit is granted, no occasion for any findings upon the issues** presented by the pleadings: Kennedy & S. L. Co. v. Dusenbery, 116 Cal. 124, 125, 47 Pac. Rep. 1008. See Snell v. Payne, 115 Cal. 218, 220, 46 Pac. Rep. 1069.

[52] And likewise where a case is submitted to the trial court upon an agreed statement of facts, the only question being as to what is the law applicable to the facts; and where findings are made in such a case, the objection that they are not justified by the evidence cannot be sustained: McMenomy v. White, 115 Cal. 339, 343, 47 Pac. Rep. 109.

Agreed statement of facts, findings unnecessary, but not harmful: Towle v. Sweeney, 2 Cal. App. 29, 83 Pac. Rep. 74.

Hawaii. Findings, when not set aside: Allen v. Redward, 10 Hawn. 151, 153.

CHAPTER XLII.

DECREE.

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§ 903. General nature of decree foreclosing liens.[1] In an action to foreclose mechanics' liens, the decree of the court

[1] See, generally, **Kerr's Cyc. Code Civ. Proc.**, §§ 664 et seq., and notes; "Practice. In General," §§ 864 et seq., ante; and see Lan-

should adjust the rights of all parties, which are proper to be determined.[2] A court of equity will render a judg-

caster v. Maxwell, 103 Cal. 67, 36 Pac. Rep. 951; Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 493, 82 Pac. Rep. 51 (uncertainty in complaint).

Vacating judgment for excusable neglect: Dusy v. Prudom, 95 Cal. 646, 30 Pac. Rep. 798.

Decree foreclosing lien of defendant, setting up sufficient claim entitling to affirmative relief in answer not designated as a cross-complaint: See Holmes v. Richet, 56 Cal. 307, 311, 38 Am. Rep. 54.

Colorado. Decree not void; reversible error; sale of several pieces, on one of which no lien; sharing pro rata: See Ryan v. Staples. 76 Fed. Rep. 21, 23 C. C. A. 541, **affirming** s. c. 62 Fed. Rep. 35.

Double judgments: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 55.

Remitting portion of judgment: See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52, 55.

Judgment cannot be rendered for items not set forth in the pleadings: Briggs v. Bruce, 9 Colo. 282, 11 Pac. Rep. 204.

Hawaii. "Record judgment": See Lucas v. Redward, 9 Hawn. 23, 26; Pacific H. Co. v. Lincoln, 12 Hawn. 358, 359.

Idaho. Giving force to decree affecting property in another state: See Idaho G. M. Co. v. Winchell, 6 Idaho. 729, 59 Pac. Rep. 533, 96 Am. St. Rep. 290.

Montana. Judgment founded upon a bill of exchange, reopened by other claimants to determine whether the consideration therefor was in fact labor or materials furnished: Gilchrist v. Helena H. S. & R. Co., 58 Fed. Rep. 708.

New Mexico. Decree of foreclosure allowing compensation to a master and his attorney, final judgment, and appealable: See Neher v. Crawford, 10 N. M. 725, 65 Pac. Rep. 156.

Conclusiveness of judgment: See Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

Curing improper judgment by filing disclaimer thereof: See Pearce v. Albright, 12 N. M. 202, 67 Pac. Rep. 726.

Vacating decree: Texas, S. F. & N. R. Co. v. Orman, 3 N. M. 612, 9 Pac. Rep. 253.

Oregon. If it nowhere appears in the judgment roll when the liens attached, the judgment would operate as a lien upon the premises as an ordinary judgment from the time it was docketed: Kendall v. McFarland, 4 Oreg. 293 (under statute allowing general execution).

Utah. Separate decrees where action is dismissed as to one of two separate liens joined in the same action: Venard v. Green, 4 Utah 67, sub nom. Venard v. Old Hickory Min. Co., 6 Pac. Rep. 415, 7 Id. 408.

Recovering not more than demanded: See Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, 1011.

Washington. Judgment foreclosing lien as damages in action on contractor's bond not subject to collateral attack: See Gritman v. United States F. & G. Co., 41 Wash. 771, 83 Pac. Rep. 6.

[2] Malone v. Big Flat G. M. Co., 76 Cal. 578, 583, 18 Pac. Rep. 772; Bewick v. Muir, 83 Cal. 368, 372, 23 Pac. Rep. 389, s. c. 83 Cal. 373, 23 Pac. Rep. 390.

Questions of title cannot be adjudicated therein: See Thorne v. Hammond, 46 Cal. 530, 534 (so as between vendor and vendee).

Under act of 1861 (Stats. and Amdts. 1861, p. 495), a decree for the sale of property would not affect the rights of holders of any other

ment in favor of each claimant according to the amount which it shall determine each is entitled to receive.[3] The court should determine and direct, under proper pleadings, to whom the fund in the hands of the owner should be paid.[4]

§ 904. **Effect of decree on third persons.** In actions to foreclose liens herein considered, the decree for the sale of the premises in its enforcement has the same, and no greater, effect upon the rights of purchasers and encumbrancers, prior to the commencement of the suit, as a similar decree would have upon the foreclosure of a mortgage. If such purchasers are not made parties, they are in no respect bound by the decree or the proceedings thereunder.[5]

kinds of liens, the statute having conferred jurisdiction upon a court of limited powers only: Van Winkle v. Stow, 23 Cal. 458, 461.

See "Nature of Lien and Remedies," § 9, and §§ 638 et seq., ante.

Arizona. Bremen v. Foreman, 1 Ariz. 413, 420, 25 Pac. Rep. 539.

Colorado. Bassick M. Co. v. Schoolfield, 10 Colo. 46, 14 Pac. Rep. 65 (Gen. Stats., § 2155); Union Pac. R. Co. v. Davidson, 21 Colo. 93, 39 Pac. Rep. 1095.

There must be a judgment against the original contractor in a suit by a subcontractor, which cannot be waived: Estey v. Halleck L. Co., 4 Colo. App. 165, 34 Pac. Rep. 1113.

Montana. See Johnson v. Puritan M. & M. Co., 19 Mont. 30, 47 Pac. Rep. 337; Masow v. Germaine, 1 Mont. 268 (1865).

Nevada. Lonkey v. Wells, 16 Nev. 271; Elliott v. Ivers, 6 Nev. 290.

New Mexico. See Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

[3] Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312.

Colorado. A court of equity will protect the rights of all parties interested by its decree: Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 423.

Idaho. The court must declare the rank and priorities of liens in its decree: Pacific States S. L. & B. Co. v. Dubois, 11 Idaho 319, 83 Pac. Rep. 513 (an exhaustive decision).

[4] Gamache v. South School Dist., 133 Cal. 145, 149, 65 Pac. Rep. 301.

[5] Whitney v. Higgins, 10 Cal. 547, 551, 70 Am. Dec. 748; Hocker v. Kelley, 14 Cal. 164, 165; March v. McKoy, 56 Cal. 85, 87.

See "Estoppel," §§ 816 et seq., ante; "Parties," §§ 662 et seq., ante.

As to validity of decree, on foreclosure of mortgage: See Watts v. Gallagher, 97 Cal. 47, 51, 31 Pac. Rep. 626; Brackett v. Banegas, 116 Cal. 278, 283, 48 Pac. Rep. 90, 58 Am. St. Rep. 164.

Colorado. Persons not served not bound by judgment: Turner v. Sawyer, 150 U. S. 578, bk. 37 L. ed. 1189, 14 Sup. Ct. Rep. 192.

Montana. See Davis v. Alvord, 94 U. S. 545, 546, bk. 24 L. ed. 283.

Washington. Harrington v. Miller, 4 Wash. 808, 810, 31 Pac. Rep. 325. See Frank v. Jenkins, 11 Wash. 611, 616, 40 Pac. Rep. 220.

Decree foreclosing lien creates a judgment upon premises, as against subsequent purchasers, without the filing in the office of the county auditor of a notice of lis pendens, or of a transcript of the judgment: Frank v. Jenkins, supra. See Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186.

§ 905. Consolidated action. After the consolidation of several actions for the foreclosure of liens, a single judgment should be entered directing the sale of the property affected by the liens, and the application of its proceeds to the satisfaction of the amount due to the respective lienholders; for, among other reasons, if different judgments were entered, there might be different purchasers, and the respective titles acquired by such purchasers would necessitate further litigation for the purpose of determining which was superior.[6]

§ 906. Kind of money in which judgment is to be satisfied. The judgment may be for the same kind of money as agreed upon in the contract; and the judgment foreclosing the lien of laborers of a person in possession of a mine under agreement with the owner to work the same may adjudge payment in gold coin, where the contract with such laborers was to pay in gold coin.[7] It appears, however, to have been held that where the claim of lien mentions "gold coin," the judgment may be for "lawful money of the United States."[8]

In Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. Rep. 273, it was held that where a lien claimant's right to a lien arises subsequent to the commencement of the mortgage foreclosure on the premises, and such lien claimant has actual knowledge of such suit, and does not seek, by intervening or otherwise, to protect his rights, he is bound by the judgment in such foreclosure suit; but the burden of proving such actual knowledge of the pendency of said action is upon the party claiming the same, where the claimant is not a party to the action and no lis pendens has been filed; and the fact that the attorney for the foreclosing mortgagee and the lien claimant is the same person is not sufficient.

Court has no jurisdiction to foreclose lien as against wife not made party to the action within the statutory period, since a wife is a necessary party to the foreclosure of a mechanic's lien on community property: Northwest B. Co. v. Tacoma S. Co., 36 Wash. 333, 78 Pac. Rep. 996.

[6] Willamette S. M. L. & Mfg. Co. v. Los Angeles College Co., 94 Cal. 229, 233, 29 Pac. Rep. 629.

See "Consolidation," §§ 869 et seq., ante.

Montana. See Mason v. Germaine, 1 Mont. 268 (1865).

Washington. See Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186.

[7] Bradbury v. Cronise, 46 Cal. 287, 289 (gold coin).

See **Kerr's Cyc. Code Civ. Proc.,** § 667, and note.

[8] See Neihaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255.

§ 907. **Interest.** Interest may be included in the judgment up to the time of its entry, upon the principal sum found due, calculated from the time of payment, where the contract prescribes such time; but if no time of payment is provided, interest may be allowed from the commencement of the action to foreclose the lien, or the time of filing the complaint therein;[9] for the lien which the statute

[9] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758. See Trustees v. Heise, 44 Md. 472; Johnson v. Boudry, 116 Mass. 196; Willamette Falls Co. v. Riley, 1 Oreg. 183.

Interest on claim from date of filing complaint, in absence of contract fixing specific date of payment. On this point the case of Pacific Mut. L. Ins. Co. v. Fisher, supra, has been followed and approved in Lane v. Turner, 114 Cal. 396, 400, 46 Pac. Rep. 290; Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312; Hines v. Miller, 126 Cal. 683, 685, 59 Pac. Rep. 142; Cutting Fruit P. Co. v. Canty, 141 Cal. 692, 697, 75 Pac. Rep. 564.

Under **Kerr's Cyc. Civ. Code,** § 3287, authorizing interest on the recovery of damages certain, or capable of being made certain, interest is allowable on a claim of lien from the time of the commencement of an action to foreclose the same, where, at the time of such commencement, the claim is capable of being made certain, either by computation or by reference to market rates: Farnham v. California S. D. & T. Co. (Cal. App., May 18, 1908), 6 Cal. App. Dec. 721, 96 Pac. Rep. 788, **following** Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312.

Same. Quantum meruit. Not allowed on. A claim for the reasonable value of services, not capable of being made certain by calculation, under **Kerr's Cyc. Civ. Code,** § 3287, is not entitled to bear interest prior to judgment: Farnham v. California S. D. & T. Co., supra.

Payment into court of amount remaining due, to be distributed by the court to claimants entitled thereto, relieves owner of liability to pay interest or costs: Hooper v. Fletcher, 145 Cal. 375, 378, 79 Pac. Rep. 418.

Subclaimants entitled to interest from the time the indebtedness became due, in an action to foreclose a lien, and have the same made a lien upon the property: Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312. See Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758.

Same. In case of unliquidated claims, interest cannot be allowed on claim prior to date of rendition of judgment: Cox v. McLaughlin, 76 Cal. 60, 18 Pac. Rep. 100, 9 Am. St. Rep. 164; Easterbrook v. Farquharson, 110 Cal. 311, 42 Pac. Rep. 811; Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 44 Pac. Rep. 719; Macomber v. Bigelow, 126 Cal. 9, 15, 58 Pac. Rep. 312.

See post, § 909.

Colorado. Where the debtor agrees to pay interest, it may be allowed: Clear Creek M. Co. v. Root, 1 Colo. 374; otherwise, it seems not: Small v. Foley, 8 Colo. App. 435, 47 Pac. Rep. 64.

Montana. Where amounts are vexatiously withheld: Mason v. Germaine, 1 Mont. 273 (1865).

Oregon. From time of filing claim: Forbes v. Willamette Falls E. Co., 19 Oreg. 61, 23 Pac. Rep. 670, 20 Am. St. Rep. 793. See Harris-

gives the claimant is as extensive as the claim which it is intended to protect.[10]

If materials are furnished from time to time as they were needed, and claimant received payments on account, his claim is not "unliquidated, and open to be adjudicated"; and if at the time of the commencement of the action to foreclose the lien the plaintiff's right of recovery on an open account has vested in him, and was capable of being made certain by calculation, he is entitled to recover interest thereon from that date.[11]

As being within the rule above stated, interest may be allowed upon the demand from the date when the claim of lien is filed for record, when, under the contract, the amount is due at the time of such filing.[12]

§ 908. **Same. Contractor.** In an action to foreclose a contractor's lien, he is entitled to interest at the legal rate upon the respective payments as provided in the original contract, from the dates when they become due; and a decree which directs interest for a period less than that directed by the findings, which prescribed interest from

burg L. Co. v. Washburn, 29 Oreg. 150, 165, 44 Pac. Rep. 390. From time the sum became due: Willamette Falls Co. v. Riley, 1 Oreg. 183. See Forbes v. Willamette Falls E. Co., supra.

Utah. From date of lien, when the sums should have been paid: Culmer v. Clift, 14 Utah 286, 47 Pac. Rep. 85.

Interest properly allowed on the sum awarded: See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360, 366.

Washington. See Kellogg v. Littell & S. M. Co., 1 Wash. 407, 411, 25 Pac. Rep. 461.

Interest allowed only from date of lien claim; no demand for interest in claim, and prayer for interest from date of claim in the complaint: Huetter v. Redhead, 31 Wash. 320, 71 Pac. Rep. 1016.

[10] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758. See following note.

[11] See **Kerr's Cyc. Code Civ. Proc.,** § 3287, and note; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 233, 39 Pac. Rep. 758; Covell v. Washburn, 91 Cal. 560, 562, 27 Pac. Rep. 859.

In Gamble v. Voll, 15 Cal. 508, 510 (1850), it was held that the fact that a judgment on a lien, including a charge of interest at two per cent, given on a prior extension of the lien, which interest was over and above the original contract price for the articles for which the lien is claimed, is not of itself conclusive evidence of fraud in the judgment, and such interest cannot be charged on the premises, as against a subsequent mortgagee.

[12] Hines v. Miller, 126 Cal. 683, 685, 59 Pac. Rep. 142.

the commencement of the trial, does not prejudice the rights of the owner.[13]

§ 909. **Same. Unliquidated demands.** As the converse of the rule stated in the last preceding section, interest cannot be allowed upon an unliquidated demand in favor of a subcontractor for the unascertained value of the work done and materials furnished by him, until the amount thereof is fixed by judgment in his favor.[14]

§ 910. **Same. Interest of subcontractor's claimants, charge against subcontractor.** Those who are employed by subcontractors at fixed rates of compensation, which they are entitled to receive upon completion of their work, may recover interest thereon, and the amount thereof may be decreed to be a lien upon the property of the owner; but such interest will be deducted from the amount found due to the subcontractors in the marshaling of the liens.[15]

§ 911. **Same. Valid contract. Payment of fund into court by owner.** Where the original contract is valid, and the owner, on the trial of actions to foreclose liens, pays the residue properly remaining in his hands as due the contractor, to be applied toward the payment of claims of lien, the owner is not liable for interest or costs, although an issue was made as to the validity of the contract, which was decided in favor of the owner.[16]

§ 912. **Default. Modification of judgment.** Where plaintiff's lien had expired before his action was commenced,

[13] Knowles v. Baldwin, 125 Cal. 224, 227, 57 Pac. Rep. 988.

[14] Macomber v. Bigelow, 126 Cal. 9, 14, 58 Pac. Rep. 312.

See note to § 907, ante.

Thus where the suit is on quantum meruit, and the account is unliquidated, interest cannot be recovered "prior to the decision of the case," or judgment: Macomber v. Bigelow, 123 Cal. 532, 56 Pac. Rep. 449, 126 Cal. 9, 16, 58 Pac. Rep. 312.

Plaintiff not entitled to interest prior to verdict or judgment in personal action, when debt not susceptible of ascertainment: See Cox v. McLaughlin, 76 Cal. 60, 66, 18 Pac. Rep. 100, 9 Am. St. Rep. 164.

[15] Macomber v. Bigelow, 126 Cal. 9, 14, 58 Pac. Rep. 312.

[16] Hooper v. Fletcher, 145 Cal. 375, 379, 79 Pac. Rep. 418.

and he takes judgment foreclosing the lien and directing a sale of the property by default, the court, of its own motion, on the next day, may properly modify the judgment to a money judgment only.[17]

§ 913. Default judgment against owner. Where a suit is brought in equity to enforce a mechanic's lien upon an oil claim, and the contract, upon which the suit is brought, was made with a lessee of the oil-land, a default judgment should not be entered against the owner, aside from the question whether the constable's certificate of service of the summons, which is not allowed under sections four hundred and ten to four hundred and fifteen,[18] requiring proof by affidavit, is permissible, under section one hundred and fifty-three of the County Government Act of 1897,[19] if there is no allegation in the complaint that the lessee had authority to develop the mine, or that the owner had knowledge that the work was being done, particularly if the mine is charged with a lien for a larger amount than the demand stated in the summons, which, in this particular, does not correspond with the prayer in the complaint.[20]

§ 914. Personal judgment.[21] When not required. To support a decree foreclosing a mechanic's lien, at least in

[17] Lacore v. Leonard, 45 Cal. 394. See Kennedy-Shaw L. Co. v. Priet, 113 Cal. 291, 45 Pac. Rep. 336; Miller v. Carlisle, 127 Cal. 327, 330, 59 Pac. Rep. 785.

Washington. Default, and judgment by court commissioner: See Peterson v. Dillon, 27 Wash. 78, 67 Pac. Rep. 397.

[18] **Kerr's Cyc. Code Civ. Proc.,** §§ 410-415.

[19] See **Henning's General Laws,** p. 189.

[20] Berentz v. Belmont O. M. Co., 148 Cal. 577, 580, 84 Pac. Rep. 47, 113 Am. St. Rep. 388, **affirming,** on this point, s. c. sub nom. Berentz v. Kern King O. & D. Co. (Cal. App., June 17, 1905), 84 Pac. Rep. 45.

[21] **Personal judgment in addition to decree enforcing lien,** not void on its face: See Canadian & A. M. & T. Co. v. Clarita L. & I. Co., 140 Cal. 672, 677, 74 Pac. Rep. 301.

Right to recover a personal judgment in an action brought to foreclose a mechanic's lien, where the lien fails, is in no way dependent upon the mechanic's-lien law: Los Angeles P. B. Co. v. Higgins (Cal. App., Aug. 8, 1908), 7 Cal. App. Dec. 164.

Claimant entitled to personal judgment against owner for work and material furnished directly to owner, he having agreed to pay therefor: Farnham v. California S. D. & T. Co. (Cal. App., May 15, 1908), 96 Pac. Rep. 788.

cases other than the owner's claimants, it is not necessary that there should be a judgment against the parties personally liable;[22] and a personal judgment against the contractor is not necessary on the part of his subclaimants.[23] The subject of parties defendant may be profitably consulted in connection with this matter.[24]

§ 915. Same. When obtained. A personal judgment may be obtained, in the action to foreclose the lien, against the party personally liable, under the general principles of law, without counsel fees or expense of preparing and recording the mechanic's lien. Thus a personal judgment may be obtained against the owner, by the original contractor, for the value of his work and materials, in a proper case;[25] or

Same. Sewer improvement. Against contractor. Error when. In an action to enforce an equitable lien against the unpaid balance of a sewer-improvement fund, by laborers who performed work upon the sewer at the instance of the subcontractors, who abandoned the work, and which laborers gave notice to withhold payment from the contractors upon such abandonment, while they are entitled to have such portion of the fund applied to the payment of their claims, they are not entitled to a personal judgment against the contractors: Goldtree v. San Diego (Cal. App., July 9, 1908), 7 Cal. App. Dec. 101.

Plaintiff entitled to a decree foreclosing his lien on the property, as well as a personal judgment against the contractor: Rasmusson v. Liming (Wash., Aug. 3, 1908), 96 Pac. Rep. 1044.

Washington. Personal judgment for part of demand for which lien not established: See Spaulding v. Burke, 33 Wash. 679, 74 Pac. Rep. 829 (under 2 Ballinger's Ann. Codes and Stats., § 5911).

[22] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 596, 25 Pac. Rep. 747.

Oregon. Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Pac. Rep. 190, 42 Pac. Rep. 997.

[23] Russ L. & M. Co. v. Garrettson, 87 Cal. 589, 596, 25 Pac. Rep. 747; Western L. Co. v. Phillips, 94 Cal. 54, 55, 29 Pac. Rep. 328.

Oregon. Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Pac. Rep. 190, 42 Pac. Rep. 997; Ainslie v. Kohn, 16 Oreg. 363, 374, 19 Pac. Rep. 97.

[24] See §§ 662 et seq., ante.

[25] Morris v. Wilson, 97 Cal. 644, 647, 32 Pac. Rep. 801. See Gnekow v. Confer (Cal., March 31, 1897), 48 Pac. Rep. 331.

Colorado. Cannon v. Williams, 14 Colo. 21, 23 Pac. Rep. 456 (1883); St. Kevin Min. Co. v. Isaacs, 18 Colo. 400, 32 Pac. Rep. 822; Finch v. Turner, 21 Colo. 287, 40 Pac. Rep. 565; Lowrey v. Svard, 8 Colo. App. 357, 46 Pac. Rep. 619.

Contra (under act of 1872): Hart v. Mullen, 4 Colo. 512 (materials); Barnard v. McKenzie, 4 Colo. 251.

Montana. Gilliam v. Black, 16 Mont. 217, 40 Pac. Rep. 303. No personal judgment can be rendered against the owner when the service of the summons is by publication: Richards v. Lewisohn, 19 Mont. 128, 130, 47 Pac. Rep. 645; nor against the contractor, although

against the contractor, by a subclaimant with whom the former has contracted;[26] or against the subcontractor, by

the lien may be foreclosed: O'Rourke v. Butte Lodge, 19 Mont. 541, 48 Pac. Rep. 1106.

No personal judgment was allowed on a separate several contract against one of joint debtors, on a claim secured by lien, in an action to foreclose the same against them: Nolan v. Lovelock, 1 Mont. 224, 229.

Personal judgment in foreclosure, under act of 1864, not allowed: Riale v. Roush, 1 Mont. 474; Mochon v. Sullivan, 1 Mont. 470.

New Mexico. Contra to text: See Rupe v. New Mexico L. Assoc., 3 N. M. 261, 5 Pac. Rep. 730.

Oregon. As an equity court is entirely without jurisdiction to enter a judgment or decree in a mechanic's-lien case against the property-owner in excess of the amount for which the lien is allowed, its power ends with the ascertainment of the amount of the lien and its enforcement, even where the contract is directly with the owner: Allen v. Elwert, 29 Oreg. 428, 44 Pac. Rep. 823, 48 Pac. Rep. 54, **approving and following** Ming Yue v. Coos Bay R. & E. R. & N. Co., 24 Oreg. 392, which holds that, under the provisions of the Oregon law, which maintains the distinction between suits in equity and actions at law, although it abolishes the difference in the forms at law, a complaint for the foreclosure of a mechanic's lien, which does not state a cause of suit, cannot be retained as an action at law to recover moneys; **following** Beacannon v. Liebe, 11 Oreg. 443, 5 Pac. Rep. 273; Burrage v. Bonanza G. & Q. M. Co., 12 Oreg. 169, 6 Pac. Rep. 766.

Washington. Spears v. Lawrence, 10 Wash. 368, 38 Pac. Rep. 1049, 45 Am. St. Rep. 789. See Littell v. Miller, 8 Wash. 566, 36 Pac. Rep. 492.

[26] Kennedy-Shaw L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336; Kennedy-Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008; Marchant v. Hayes, 120 Cal. 137, 139, 49 Pac. Rep. 840.

Colorado. Hume v. Robinson, 23 Colo. 359, 362, 47 Pac. Rep. 271.

Personal judgment against party liable, under 3 Mills's Ann Stats., 1st ed., § 2894. See American Nat. Bank v. Barnard, 15 Colo. App. 110, 61 Pac. Rep. 200, 202.

Void personal judgment or for lien foreclosure: See Schweitzer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843.

Montana. Goodrich L. Co. v. Davie, 13 Mont. 76, 32 Pac. Rep. 282.

Washington. Peterman v. Milwaukee B. Co., 11 Wash. 199, 200, 39 Pac. Rep. 452. Under a previous act, an appeal from a decree of foreclosure of a mechanic's lien, which resulted in the reversal of the decree on account of the invalidity of the lien, will not affect a personal judgment obtained against the contractor in the foreclosure proceedings under the code of 1881, when he is not joined in the appeal: Littell v. Miller, 8 Wash. 566, 36 Pac. Rep. 492. In this case it was said, speaking of the cases of Hildebrandt v. Savage, 4 Wash. 524, 30 Pac. Rep. 643, 32 Pac. Rep. 109, and Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. Rep. 923:

"**Upon a careful consideration** of the opinions, in the light of the facts before the court, it will be seen that they did not go to the extent of holding that a judgment against the contractor, under the circumstances of these cases, would be absolutely void. The most that can be said to have been established by these cases is, that the rendition of a judgment against the contractor, in a suit

his material-man, for material purchased by the former, and used in the building.[27]

§ 916. Same. Purchaser of property assuming debt. If a purchaser of the property agrees to pay the debt at the time of the purchase, and assumes the debt, a personal judgment may be rendered against him, if he is made a party to the foreclosure of the lien,[28] in the same manner that a deficiency judgment may be entered against the grantee of a mortgager, who has assumed the mortgage debt.[29]

§ 917. Same. Notice to owner to withhold payments. A personal judgment may also be rendered against the employer upon sufficient notice to such employer to stop payments due from the employer to the original contractor, under section eleven hundred and eighty-four,[30] in the manner heretofore pointed out,[31] which notice is in the nature

to foreclose, after it had been adjudged that no lien existed, would be erroneous."

Tacoma L. & Mfg. Co. v. Wolff, 7 Wash. 478, 35 Pac. Rep. 115, 755, was cited as establishing that doctrine (Stiles, J., dissenting). See also Tacoma L. Co. v. Wolff, 5 Wash. 264, 31 Pac. Rep. 753, 32 Pac. Rep. 462; Warren v. Quade, 3 Wash. 750, 755, 29 Pac. Rep. 827. The case of Hildebrandt v. Savage, supra, cited the Colorado cases of Barnard v. McKenzie and Cannon v. Williams, supra, to the effect that where the statute does not authorize the same, in a suit in a court of equity to foreclose the lien no personal judgment can be obtained where the lien fails, and the case of Schettler v. Vendome Turkish Bath Co., 2 Wash. 457, 27 Pac. Rep. 76, was also cited to that effect; and it was held that the case of Kellogg v. Littell & S. Mfg. Co., 1 Wash. 407, 25 Pac. Rep. 461, was not in conflict with this position, the distinguishing feature in the latter case being that there had been no objection to the trial of these matters in the equitable proceeding, and there had been no demand for a jury trial; a dissenting opinion, however, on the point last stated, being filed.

Wyoming. Fein v. Davis, 2 Wyo. 118, 124 (although the lien was not sustained).

[27] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860. See McMenomy v. White, 115 Cal. 342, 343, 47 Pac. Rep. 132; Marchant v. Hayes, 120 Cal. 137, 139, 52 Pac. Rep. 154; Humboldt L. & M. Co. v. Crisp, 146 Cal. 686, 688, 81 Pac. Rep. 30, 106 Am. St. Rep. 75, 2 Am. & Eng. Ann. Cas. 811.

[28] San Francisco P. Co. v. Fairfield, 134 Cal. 220, 226, 66 Pac. Rep. 255.

[29] Hopkins v. Warner, 109 Cal. 133, 41 Pac. Rep. 868; San Francisco Pav. Co. v. Fairfield, 134 Cal. 220, 226, 66 Pac. Rep. 255.

[30] **Kerr's Cyc. Code Civ. Proc., § 1184.**

[31] §§ 547 et seq., ante.

of a garnishment of such moneys either due or to become due.[32]

§ 918. **Same. Subclaimant against contractor. Default.** Where a judgment of nonsuit is granted, in a consolidated action, in favor of the owners, against one of the subclaimants, for insufficiency of his claim of lien, the claimant still remains a party to the consolidated action as against the other plaintiffs in the several actions and against the contractor. When, in such case, however, the contractor defaults, the lien claimants may recover judgment against him by default.[33]

§ 919. **Same. When not given.** In an action to enforce a lien of mechanics and others for materials furnished or labor performed, neither a personal judgment for the amount of the claim,[34] nor for a deficiency,[35] can be rendered against

[32] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45; Bates v. Santa Barbara County, 90 Cal. 543, 547, 27 Pac. Rep. 438.

See "Cumulative Remedies," §§ 638 et seq., ante.

Oregon. Contra: Allen v. Elwert, 29 Oreg. 429, 44 Pac. Rep. 823, 45 Pac. Rep. 54; Ming Yue v. Coos Bay R. & E. R. & N. Co., 24 Oreg. 392, 33 Pac. Rep. 641.

[33] Kennedy-Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

See "Evidence," §§ 795 et seq., ante.

Montana. Personal judgment on failure to establish lien: See Mason v. Germaine, 1 Mont. 267 (1865).

[34] Barber v. Reynolds, 44 Cal. 519, 537; Eaton v. Rocca, 75 Cal. 93, 97, 16 Pac. Rep. 529; Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 338; Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 200, 20 Pac. Rep. 419; Gibson v. Wheeler, 110 Cal. 243, 246, 42 Pac. Rep. 810; Gnekow v. Confer (Cal., March 31, 1897), 48 Pac. Rep. 331; Santa Clara V. M. & L. Co. v. Williams (Cal., Dec. 8, 1892), 31 Pac. Rep. 1128. See Neihaus v. Morgan (Cal., June 2, 1896), 45 Pac. Rep. 255.

See "Liability of Owner," §§ 523 et seq., ante; "Cumulative Remedies," §§ 638 et seq., ante.

Under peculiar statute of 1861 (Stats. and Amdts. 1861, p. 495), a personal judgment had to be recovered in another action in a court of competent jurisdiction: Van Winkle v. Stow, 23 Cal. 457, 459. See McNeil v. Borland, 23 Cal. 144.

Colorado. Lowrey v. Svard, 8 Colo. App. 357, 46 Pac. Rep. 619; Hume v. Robinson, 23 Colo. 359, 47 Pac. Rep. 271.

Montana. Gilliam v. Black, 16 Mont. 217, 40 Pac. Rep. 303 (agent).

Washington. Mentzer v. Peters, 6 Wash. 540, 33 Pac. Rep. 1078 (owner). But see Kellogg v. Littell & S. Mfg. Co., 1 Wash. 407, 411, 25 Pac. Rep. 461.

[35] See **Kerr's Cyc. Code Civ. Proc.,** § 1194.

Act of March 30, 1868, § 10, subd. 2, providing that each claimant shall be entitled to an execution for any balance found due him after

those defendants against whom no personal claim has been established according to the general principles of law, even if the statutory original contract is void.[36]

§ 920. **Same. Death of owner. Recovery against estate.** Where the owner dies, the suit of subclaimants to foreclose a lien upon the property, being in the nature of a proceeding in rem, in which no personal judgment is rendered against the owner, there can be no recovery against his estate, payable in due course of administration.[37]

§ 921. **Same. Jurisdiction of superior court to render personal judgment in suit to foreclose lien.** When the superior court acquires jurisdiction by the filing of a suit to foreclose a mechanic's lien, it has jurisdiction to render a personal judgment for the amount claimed, although the right to the lien is denied, and the amount claimed is less than three hundred dollars.[38]

§ 922. **Deficiency judgment.** "Whenever, in the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency, in like manner and with like effect as in actions for the foreclosure of mortgages";[39] and a personal judgment may be docketed against the owner,[40] or contractor, for such

the disposition of the proceeds of the sale, must be confined to those cases in which a defendant, upon general principles of law, and irrespective of the provisions of the act, would be personally liable for the work done and materials furnished: Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 338. See preceding note.

[36] Kellogg v. Howes, 81 Cal. 170, 180, 22 Pac. Rep. 509, 6 L. R. A. 588; Southern Cal. L. Co. v. Schmitt, 74 Cal. 625, 627, 16 Pac. Rep. 516; Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 647, 22 Pac. Rep. 860; First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 65, 40 Pac. Rep. 45.

[37] Booth v. Pendola, 88 Cal. 36, 44, 23 Pac. Rep. 200, 24 Id. 714, 25 Id. 1101.

Non-presentation of claim, owner's laborer: Weithoff v. Murray, 76 Cal. 508, 511, 18 Pac. Rep. 435.

[38] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983, **affirming** Becker v. Superior Court (Cal. Sup., May 21, 1907), 90 Pac. Rep. 689, **which overrules,** on this point, Miller v. Carlisle, 127 Cal. 327, 59 Pac. Rep. 785.

[39] **Kerr's Cyc. Code Civ. Proc.,** § 1194.

[40] See Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 231, 39 Pac. Rep. 758.

deficiency as each may be personally liable for to the persons with whom he dealt.[41]

§ 923. **Same. Notice to owner to withhold payments.** In like manner, a deficiency judgment against the person to whom the materials were furnished, or for whom the work was performed, may be obtained in an action to subject the unpaid portion of the contract price to the payment of the claimant's claim, after notice to the owner,[42] provided for in section eleven hundred and eighty-four,[43] in the manner heretofore pointed out,[44] without seeking to enforce a lien against the building.[45]

§ 924. **Same. Judgment for gross amount.** In an action foreclosing miners' liens, the court must determine the amount for which the defendants are liable to the plaintiffs, in order that it may be seen, when the sheriff's return comes in, whether there is a deficiency in the proceeds of sale; and this determination by the court is its judgment upon the allegations of the plaintiffs in this respect, and, under section six hundred and sixty-eight, is properly entered by the clerk in the "judgment-book."[46]

§ 925. **Same. Form of judgment.** In a suit to enforce miners' liens, where the decree declares that "judgment be, and the same is hereby, entered in favor of plaintiffs and against defendants," in certain specified sums, and that the liens are foreclosed, and directs that the property be sold, and if the amount derived from the sale is insufficient,

[41] Giant P. Co. v. San Diego F. Co., 78 Cal. 193, 200, 20 Pac. Rep. 419; Wood v. Oakland & B. R. T. Co., 107 Cal. 500, 502, 40 Pac. Rep. 806.

New Mexico. Ford v. Springer Land Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

Washington. Execution for deficiency: See Eisenbeis v. Wakeman, 8 Wash. 534, 539, 28 Pac. Rep. 923.

[42] See §§ 547 et seq., ante.

[43] **Kerr's Cyc. Code Civ. Proc.,** § 1184.

[44] See §§ 547 et seq., ante.

[45] Bates v. Santa Barbara County, 90 Cal. 543, 548, 27 Pac. Rep. 438.

[46] Hines v. Miller, 126 Cal. 683, 685, 59 Pac. Rep. 142 (under **Kerr's Cyc. Code Civ. Proc.,** § 668).

Utah. Deficiency judgment against building after sale of land: See Sanford v. Kunkel, 30 Utah 379, 85 Pac. Rep. 363, 1012.

judgment for deficiency be docketed, such judgment is not enforceable as a personal judgment, except for such deficiency as may be shown upon the return of the sheriff. Such judgment will not be reversed by the appellate court upon the theory that a personal judgment, except for such deficiency, was not authorized.[47]

§ 926. **Prior mortgage. Decree of sale.** In a suit to enforce a senior mortgage and mechanics' liens, the mortgage affecting only part of the lands embraced in the other liens, a judgment providing for the sale, in satisfaction of the mechanics' liens, of the mortgaged lands is erroneous;[48] and when all the questions relating to the liens are involved in another suit, the judgment foreclosing the senior mortgage should be modified so as to confine it to the foreclosure of the senior mortgage and to securing any surplus resulting from the sale of the premises affected by the mortgage for the benefit of the holders of the mechanics' liens.[49]

§ 927. **Interests in land. When can be ordered sold.** The interest of any one in the property upon which a lien for labor performed upon or materials furnished for the same is sought to be enforced cannot be adjudged to be sold, unless his liability is under the statute, or otherwise proved under proper averments in the complaint in the action to foreclose the lien.[50]

§ 928. **Recitals in decree. Foreclosure of interest.** In an action to foreclose the liens of mechanics and others for materials furnished for or labor performed upon real property, the decree should recite that the defendants are forever barred and foreclosed of all right, etc., "from and after the delivery of the sheriff's deed, after sale as hereinafter provided."[51]

[47] Hines v. Miller, 126 Cal. 683, 59 Pac. Rep. 142.

[48] McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622; Willamette S. M. Co. v. Kremer, 94 Cal. 205, 29 Pac. Rep. 633.

[49] McClain v. Hutton, 131 Cal. 132, 141, 61 Pac. Rep. 273, 63 Id. 182, 622.

[50] Eaton v. Rocca, 75 Cal. 93, 97, 16 Pac. Rep. 529; Phelps v. Maxwell's Creek G. M. Co., 49 Cal. 336, 338.

[51] Castagnetto v. Coppertown Co., 146 Cal. 329, 80 Pac. Rep. 74.

§ 929. **Same. Ownership. Knowledge.** It is not necessary, in the judgment foreclosing the lien, to repeat that at the time of the commencement of the action the land belonged to the person who caused the building to be constructed, or that it was erected with his knowledge, where these allegations are made in the complaint, and found to be true by the court.[52]

§ 930. **Extent of lien. Statutory provision.** Section eleven hundred and eighty-five [53] provides: "The land upon which any building, improvement, well, or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if, at the commencement of the work, or of the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, well, or structure to be constructed, altered, or repaired, but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien." [54]

[52] Dusy v. Prudom, 95 Cal. 646, 649, 30 Pac. Rep. 798.

Montana. It is not necessary for claimant to claim, upon foreclosure, the right to remove improvements upon which his lien has been enforced, or to have the decree provide for such removal within a reasonable time: Grand Opera House Co. v. McGuire, 14 Mont. 558, 37 Pac. Rep. 607.

New Mexico. "If it should appear, on a hearing, that any portion of the property upon which the labor was performed, or in the construction of which the materials were used, did not become a part of the realty, or that the same was severed therefrom after the lien had attached, the decree can be so molded as to reach such property" (dictum): Post v. Miles, 7 N. M. 317, 34 Pac. Rep. 586.

In an action at law, if a joint liability is charged, judgment cannot be entered separately against one of the parties; and in an action in assumpsit a judgment to enforce a mechanic's lien cannot be entered against any or all the parties: Rupe v. New Mexico L. Assoc., 3 N. M. 393, 9 Pac. Rep. 301. See Straus v. Finane, 3 N. M. 398, 5 Pac. Rep. 729; Finane v. Las Vegas H. & I. Co., 3 N. M. 256, 5 Pac. Rep. 725.

[53] **Kerr's Cyc. Code Civ. Proc.,** § 1185.

[54] See §§ 438 et seq., §§ 399 et seq., §§ 166 et seq., and §§ 717 et seq., ante.

Arizona. Interest of vendor not causing improvement can only be sold by ordering payment of unpaid purchase price: Bremen v. Foreman, 1 Ariz. 413, 25 Pac. Rep. 539 (Comp. Laws, p. 248, § 4).

§ 931. **Same. Necessity of designating property to be sold.** In an action to foreclose the lien, it is necessary that the property which the plaintiff seeks to subject to sale therefor shall be definitely described, and that the judgment shall specifically designate the property affected by the lien and directed to be sold; otherwise the officer executing the judgment can neither point out the property which he offers for sale, nor place the purchaser in possession thereof, and the deed which he may execute will not convey any title.[55]

§ 932. **Same. Effect of failure to define extent of land.** But failure of the court to define the exact amount or extent of land necessary for the building does not invalidate the decree, and it will not be reversed upon appeal of the owner. In such case, however, it may be that the purchaser would acquire no land beyond that covered by the building described in the decree.[56]

§ 933. **Same. Order directing sale of entire building.** Where it appears that the building covers more land than is described in the complaint, but the claim of lien is sufficient to embrace the entire building, the court should direct amendments to the complaint, so that it may conform to the proofs. The court should then direct the sale of the entire building, and such land as it should determine to

[55] Gamble v. Voll, 15 Cal. 507, 510; Willamette S. M. Co. v. Kremer, 94 Cal. 205, 210, 29 Pac. Rep. 633.

[56] Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932. Thus where the claim of lien describes the land around the building on which the lien is claimed, in these words, "with such convenient space of land around the same as may be required for the convenient use and occupation thereof," the description is sufficient; but it is proper for the court, by its decree, to define the amount and extent of land connected with the building, which is properly subject to the lien, and if the decree follows the description in the claim, it does not invalidate the decree, but it is doubtful whether the purchaser will acquire any land beyond that covered by the building: Tibbetts v. Moore, 23 Cal. 208, 213.

Montana. Vantilburgh v. Black, 2 Mont. 371.

Nevada. See Dickson v. Corbett, 11 Nev. 277.

New Mexico. Description by metes and bounds, or government surveys, governs quantities: Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

be required for the convenient use and occupation thereof. A decree which directs a sale of only that part of the building which is upon the premises set forth in the complaint is erroneous.[57]

§ 934. Same. Land necessary for convenient use and occupation. It is not necessary to repeat the statement in the judgment, that the land directed to be sold is all necessary for the convenient use and occupation of the building, where the complaint, in the action of foreclosure of the lien, alleges that all of such land is necessary for such use and occupation, and the court finds this allegation to be true.[58] The decree, in the absence of any description of more land for its convenient use and occupation, directs the sale only of the building, and the land on which it is situated.[59]

[57] Willamette S. M. Co. v. Kremer, 94 Cal. 205, 210, 29 Pac. Rep. 633.

Colorado. Separate liens on land and building; decree apportioning liens and establishing priorities: See Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419.

[58] Dusy v. Prudom, 95 Cal. 646, 649, 30 Pac. Rep. 798.

See §§ 438 et seq., ante.

New Mexico. Decree ordering sale of entire mining claim proper, without reciting that all is necessary for convenient use and occupation, where no structure has been erected; and testimony must be taken in lower court, in order to limit extent of lien: See Post v. Fleming, 10 N. M. 476, 62 Pac. Rep. 1087, 1090.

[59] Newell v. Brill, 2 Cal. App. 61, 64, 83 Pac. Rep. 76. See Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. Rep. 932.

CHAPTER XLIII.

COSTS AND ATTORNEYS' FEES.

§ 935. Costs and attorneys' fees. Statutory provision.
§ 936. Costs. Preparing, filing, and recording claim of lien.
§ 937. Same. Recovery by owner.
§ 938. Same. Recovery of costs against owner. Prolonging litigation.
§ 939. Same. Owner may set off costs and interest against contractor when.
§ 940. Attorneys' fees. Unconstitutionality of provision.
§ 941. Same. Attorneys' fees not allowed, except on foreclosure of liens on property.
§ 942. Same. Nature of attorneys' fees allowed, and their relation to costs.
§ 943. Same. Measure of attorneys' fees.
§ 944. Same. Relation of legal services to action.
§ 945. Same. Agreement as to fees.
§ 946. Same. Lower court fixing attorneys' fees in supreme court.
§ 947. Same. When owner not liable for attorneys' fees.

§ 935. Costs and attorneys' fees.[1] Statutory provision. Section eleven hundred and ninety-five[2] provides: "The

[1] **Costs.** Completion of trial before expiration of five days after offer of compromise: See Scammon v. Denio, 72 Cal. 393, 14 Pac. Rep. 98.

See, generally, "Obligations of Owner," §§ 523 et seq., ante, and "Constitutionality," § 40, ante.

Colorado. Appropriation of money to pay costs to accrue not to be applied to judgment: See Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843. See Sayre-Newton L. Co. v. Union Bank, 6 Colo. App. 541, 41 Pac. Rep. 844.

Idaho. Cost of protesting an acceptance cannot be included in decree as damages: Bradbury v. Idaho & O. L. I. Co., 2 Idaho 221, 10 Pac. Rep. 620.

Montana. Provision for attorneys' fees (Comp. Stats., § 1394) held applicable to all liens in chapter on liens: Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. Rep. 280 (1889).

Oregon. Refusal of trial court to allow costs in suit in equity (to foreclose mechanic's lien) will not be reviewed, except in case of an abuse of discretion: Leick v. Beers, 28 Oreg. 483, 43 Pac. Rep. 658. Division of costs sustained: Chamberlain v. Hibbard, 26 Oreg. 428, 38 Pac. Rep. 437.

[2] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

court must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme courts, such costs and attorneys' fees to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant, or whether they all join in one action or separate actions are consolidated."[3]

§ 936. Costs. Preparing, filing, and recording claim of lien. Notwithstanding the holding of the court that attorneys' fees may not constitutionally be allowed, which is discussed elsewhere,[4] it has been determined that the small expense of filing the claim of lien is properly included in the phrase "costs and disbursements."[5] The right to recover the costs of filing and recording the claim of lien, like the general right to recover costs, is a necessary incident to the judgment establishing the lien,[6] and does not depend upon any averments in the complaint, except such as are necessary to establish the lien, but the costs of preparing a claim of lien, or attorneys' fees therefor, are not a part of such costs.[7]

[3] See "Consolidation," §§ 869 et seq., ante; **Kerr's Cyc. Code Civ. Proc.**, § 1184.

Withholding costs by the owner, after notice: See "Notice," §§ 547 et seq., ante.

See **Kerr's Cyc. Code Civ. Proc.**, § 1193.

Recovery of costs from the contractor by the owner: See "Rights of Owner," §§ 510 et seq., ante.

New Mexico. Master adding unnecessary expenses as to notice of sale, etc., before redemption period has expired, cannot recover back such expenses, if the liens are paid before the redemption period expires: Neher v. Crawford, 10 N. M. 725, 65 Pac. Rep. 156.

Unnecessary expenses on sale not costs: See Neher v. Crawford, 10 N. M. 725, 65 Pac. Rep. 156.

[4] See § 40, ante, and § 940, post.

[5] Builders' S. Depot v. O'Connor (Cal., Jan. 10, 1907), 88 Pac. Rep. 982, 985.

[6] Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144. See Carriere v. Minturn, 5 Cal. 435; Rapp v. Spring Valley G. Co., 74 Cal. 532, 16 Pac. Rep. 325; West Coast L. Co. v. Newkirk, 80 Cal. 275, 22 Pac. Rep. 231.

[7] Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144. See **Kerr's Cyc. Code Civ. Proc.**, § 1184. It has been held that in an action to foreclose a lien of a material-man and of subcontractors in the city and county of San Francisco, the plaintiffs, as the prevailing parties, were entitled to recover as costs the percentage of the amount recovered allowed by the act of February 9, 1866: Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 118, 38 Pac. Rep. 635.

Void contract. Contractor's right to costs. Where the statutory original contract is void, the original contractor has no lien, and in an action on the implied contract, he cannot recover counsel fees or expenses of preparing or recording a claim of lien.[8]

§ 937. **Same. Recovery by owner.** Where the owner obtains a nonsuit against a lien claimant for the insufficiency of his claim of lien, the former is entitled to a judgment against the latter for costs, although the latter may remain a party to the action, as against other parties than the owner.[9]

§ 938. **Same. Recovery of costs against owner. Prolonging litigation.** It has been held that where the contractor defaults in a suit to enforce a lien by his subclaimant, and thus there is no contest between the contractor and his subclaimants, and the owner, apparently without cause or right, raises a contest on every point, and litigates the case to the end, the latter thereby delays the claimants in recovering the money justly due, and puts them to unnecessary expense; and, under a valid original contract, the balance due thereunder is not the limit of the owner's liability, so far as costs and attorneys' fees are concerned, but they are properly allowed, and made payable out of the proceeds of the property ordered to be sold.[10]

§ 939. **Same. Owner may set off costs and interest against contractor when.** In an action by the contractor against the owner, the latter may set off the amount paid by him upon foreclosure of the liens of material-men for materials furnished the contractor, including the amount

Washington. Costs may be ordered paid out of amount tendered and deposited by the owner into court: Kruegel v. Kitchen, 33 Wash. 214, 74 Pac. Rep. 373.

[8] Morris v. Wilson, 97 Cal. 644, 647, 32 Pac. Rep. 801.

[9] Kennedy-Shaw L. Co. v. Dusenbery, 116 Cal. 124, 126, 47 Pac. Rep. 1008.

[10] De Camp L. Co. v. Tolhurst, 99 Cal. 631, 635, 34 Pac. Rep. 438. See also Covell v. Washburn, 91 Cal. 560, 27 Pac. Rep. 859.

See "Obligations of Owner," §§ 523 et seq., ante; and § 944, post.

allowed and paid for attorneys' fees and costs,[11] as well as for principal and interest on the liens;[12] but where the owner had accepted and agreed to pay orders of the contractor, he cannot recover the costs and expenses incurred by reason of his refusal to pay them.[13]

§ 940. Attorneys' fees. Unconstitutionality of provision. The California courts, as has already been shown,[14] after some wavering, and in line with the decisions of some and against the ruling in other states, have held that the provision of the statute [15] providing an allowance for attorneys' fees is unconstitutional.[16] This rule must be considered as

[11] Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394; Covell v. Washburn, 91 Cal. 560, 27 Pac. Rep. 859.

See "Obligations of Owner," §§ 523 et seq., ante.

[12] Covell v. Washburn, 91 Cal. 560, 562, 27 Pac. Rep. 859.

[13] Adams v. Burbank, 103 Cal. 646, 651, 37 Pac. Rep. 640.

See "Obligations of Owner," §§ 523 et seq., ante.

[14] See § 40, ante.

[15] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

[16] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983 (judgment modified by striking out allowance); Union L. Co. v. Simon (Cal. Sup.), 89 Pac. Rep. 1081, **reversing** s. c., on this point (Cal. App., March 13, 1906), 89 Pac. Rep. 1077; Builders' Supply Depot v. O'Connor (Cal., Jan. 10, 1907), 88 Pac. Rep. 982, 985; H. Raphael Co. v. Grote (Cal., Aug. 10, 1908), 36 Cal. Dec. 125; Los Angeles P. B. Co. v. Los Angeles P. B. & D. Co. (Cal. App., Jan. 23, 1908), 94 Pac. Rep. 775; Hill v. Clark (Cal. App., Feb. 28, 1908), 95 Pac. Rep. 382; Farnham v. California S. D. & T. Co. (Cal. App., May 15, 1908), 96 Pac. Rep. 788; Los Angeles P. B. Co. v. Higgins (Cal. App., July 9, 1908), 7 Cal. App. Dec. 95.

Error to assess attorney fees in costs: H. Raphael Co. v. Grote (Cal., Aug. 10, 1908), 36 Cal. Dec. 125; Hall v. Clark (Cal. App., Feb. 28, 1908), 95 Pac. Rep. 382; Farnham v. California S. D. & T. Co. (Cal. App., May 15, 1908), 96 Pac. Rep. 788.

Even though provided for by statute: Hill v. Clark (Cal. App., Feb. 28, 1908), 95 Pac. Rep. 382.

Earlier decisions otherwise: Peckham v. Fox, 1 Cal. App. 307, 309, 82 Pac. Rep. 91. See Linck v. Johnson, 134 Cal. xix, 66 Pac. Rep. 674.

See "Constitutional Aspects," § 40, ante.

Colorado. The provision of Sess. Laws 1893, ch. cxvii, p. 325, § 18 (3 Mills's Ann. Stats., 1st ed., § 2893a), relating to attorneys' fees, being unconstitutional, none can be allowed in an action to foreclose mechanics' liens: Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340; Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107; Campbell v. Los Angeles G. M. Co., 28 Colo. 256, 64 Pac. Rep. 194 (writ of error presenting this sole question not allowed); Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 466, 59 Pac. Rep. 83, 87; Antlers Park R. M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226; Perkins v. Boyd, 16 Colo. App. 266, 65

established in California, although, at most, its soundness may be considered a question upon which a difference of opinion might reasonably exist.[17] An allowance of attorneys' fees, therefore, in an action to foreclose mechanics' liens, is now erroneous in those states in which the provision has been held unconstitutional,[18] and as to them the adjudicated law relating to the subject becomes comparatively unimportant.

§ 941. **Same. Attorneys' fees not allowed, except on foreclosure of liens on property.** In a simple action against the one personally liable,[19] or in an action to subject the unpaid portion of the contract price to the payment of the claim, without seeking the foreclosure of a lien upon the realty, a claimant is not entitled to recover for the attorneys' fees, or for the expenses incurred by him for filing

Pac. Rep. 350, s. c. (Sup. Ct.), 86 Pac. Rep. 1045. See Eagle G. M. Co. v. Bryarly, 28 Colo. 262, 65 Pac. Rep. 52.

Idaho. The provision of Sess. Laws 1899, ch. 1, p. 150, § 12, relating to the allowance of attorneys' fees on foreclosure of mechanics' liens, is constitutional, and they should be allowed: Thompson v. Wise Boy M. & M. Co., 9 Idaho 363, 74 Pac. Rep. 958.

Attorneys' fees are allowed upon the foreclosure of mechanics' and laborers' liens: Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218.

Montana. Provision for attorneys' fees held constitutional: Helena S. H. & S. Co. v. Wells, 16 Mont. 65, 40 Pac. Rep. 78; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. Rep. 280 (1889).

New Mexico. Provision as to attorneys' fees in Comp. Laws 1897, § 2229, held constitutional: Genest v. Las Vegas M. B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743.

Utah. Provision in Rev. Stats., § 1400, for attorneys' fees, held unconstitutional: Brubaker v. Bennett, 19 Utah 401, 57 Pac. Rep. 170.

Washington. Provision for attorneys' fees held constitutional: Littell v. Saulsberry, 40 Wash. 550, 82 Pac. Rep. 909 (2 Ballinger's Ann. Codes and Stats.); Ivall v. Willis, 17 Wash. 645, 50 Pac. Rep. 467 (Laws 1893, p. 428, § 17). See Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571; Fitch v. Applegate, 24 Wash. 25, 64 Pac. Rep. 147.

[17] Merced L. Co. v. Bruschi (Cal. Sup., Nov. 29, 1907), 92 Pac. Rep. 844.

Attorneys' fees allowed, under Kerr's Cyc. Code Civ. Proc., § 1195, were held to be a lien upon the property: Peckham v. Fox, 1 Cal. App. 307, 309, 82 Pac. Rep. 91.

[18] Stimson M. Co. v. Nolan (Cal. App., June 19, 1907), 91 Pac. Rep. 262; Builders' Supply Depot v. O'Connor (Jan. 10, 1907), 88 Pac. Rep. 982.

Washington. Attorneys' fees: See Fitch v. Applegate, 24 Wash. 25, 64 Pac. Rep. 147 (work on sawmill); Ivall v. Willis, 17 Wash. 645, 50 Pac. Rep. 467; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571.

[19] Central L. & M. Co. v. Center, 107 Cal. 193, 197, 40 Pac. Rep. 334.

a claim of lien. Under the statute, such items are only recoverable in actions to enforce the liens;[20] and even though a claimant is successful in such action on appeal to the supreme court, no attorney's fee will be allowed, if, finally, the lien is not sustained.[21]

§ 942. Same. Nature of attorneys' fees allowed, and their relation to costs. Where the statute relating to liens of mechanics and others upon real property is upheld, the attorney's fee allowed thereunder upon foreclosure of the lien is not technically nor strictly speaking a part of the costs;[22] and if allowed by the court, it seems that it need not be placed in the memorandum of costs;[23] but it bears

[20] Bates v. County of Santa Barbara, 90 Cal. 543, 548, 27 Pac. Rep. 438.

Plaintiff cannot recover attorneys' fees out of the proceeds of the property, where he fails to establish his lien: Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 234, 39 Pac. Rep. 758; Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 632, 43 Pac. Rep. 14. And likewise under the act of March 31, 1891, relating to laborers, declared unconstitutional (see § 31, ante), where the plaintiff did not establish a lien, no recovery of attorneys' fees was allowed: Ackley v. Black Hawk G. M. Co., 112 Cal. 42, 45, 44 Pac. Rep. 330.

Idaho. Costs: See Bradbury v. Idaho & O. L. I. Co., 2 Idaho 221, 10 Pac. Rep. 620.

[21] McIntyre v. Trautner, 78 Cal. 449, 21 Pac. Rep. 15. See Stimson v. Dunham C. & H. Co., 146 Cal. 281, 285, 79 Pac. Rep. 968.

Contractor not entitled to attorneys' fees when fund is exhausted: Stimson v. Dunham C. & H. Co., 146 Cal. 281, 285.

[22] McIntyre v. Trautner, 78 Cal. 449, 21 Pac. Rep. 15; Schallert-Ganahl L. Co. v. Neal, 94 Cal. 192, 193, 29 Pac. Rep. 622; Rapp v. Spring Valley G. Co., 74 Cal. 532, 533, 16 Pac. Rep. 325.

Oregon. "The attorney's fee provided for in the mechanic's-lien act (Hill's Ann. Laws, § 3677) are not fixed and determined by the act, nor imposed strictly as a penalty, but rather in the nature of costs, of which the amount is to be determined by the court; and it is therefore . . . not obnoxious to the constitution," as granting privileges to one litigant not granted to another, or denying the equal protection of the laws: Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454, **citing** Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571.

Washington. The provision as to attorneys' fees held not to conflict with the state constitution: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571. See Fitch v. Applegate, 24 Wash. 25, 64 Pac. Rep. 147.

[23] Rapp v. Spring Valley G. Co., 74 Cal. 532, 16 Pac. Rep. 325; but see Smith v. Solomon, 84 Cal. 537, 539, 24 Pac. Rep. 286; Russ L. Co. v. Garrettson, 87 Cal. 589, 596, 25 Pac. Rep. 747; Clark v. Taylor, 91 Cal. 552, 555, 27 Pac. Rep. 860.

some resemblance to costs, as it is an incident to the judgment.[24]

§ 943. **Same. Measure of attorneys' fees.** The general rule with reference to attorneys' fees permitted under provisions relative to the liens of mechanics and others for labor performed upon or materials furnished for improvements on real property is, that the court may allow a reasonable attorney's fee [25] to each of the lien claimants whose lien is estab-

[24] Rapp v. Spring Valley G. Co., 74 Cal. 532, 16 Pac. Rep. 325; McIntyre v. Trautner, supra; Schallert-Ganahl L. Co. v. Neal, supra.

Colorado. Under Stats. 1893, p. 315, no attorney's fee can be allowed, under the language of the statute, unless judgment of foreclosure is obtained: Los Angeles G. M. Co. v. Campbell, 13 Colo. App. 455, 56 Pac. Rep. 246.

Oregon. Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271.

[25] **Attorneys' fees held properly allowed and reasonable in the following cases:** Amount recovered, $74; attorney's fee, $50: Hagman v. Williams, 88 Cal. 146, 25 Pac. Rep. 1111. Amount recovered, $483.72; attorney's fee, $100: Scammon v. Denio, 72 Cal. 393, 397, 14 Pac. Rep. 98. Amount recovered, $147.21; increased by supreme court to $672.21; attorney's fee, $50: Schallert-Ganahl L. Co. v. Neal, 91 Cal. 362, 366, 27 Pac. Rep. 742. Amount recovered, $1,070; attorney's fee allowed, $175: See Covell v. Washburn, 91 Cal. 560, 562, 27 Pac. Rep. 859. Amount recovered, $100; attorney's fee, $50: Clancy v. Plover, 107 Cal. 272, 274, 40 Pac. Rep. 394. Amount recovered, aggregating $750; two attorneys, fees of $25 and $75: Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072 (the supreme court saying, "While the sums allowed seem rather small, we cannot say that the court abused its discretion in determining that $75 was a reasonable fee"). Amount recovered, $691.20; attorney's fee allowed, $100: Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144. Amount recovered, $67.50; attorney's fee allowed, $25: Anderson v. Johnston, 120 Cal. 657, 658, 53 Pac. Rep. 264.

"Reasonable attorneys' fees," amounts not mentioned: Jewell v. McKay, 82 Cal. 144, 152, 23 Pac. Rep. 139; Western L. Co. v. Phillips, 94 Cal. 54, 29 Pac. Rep. 328; Bates v. Santa Barbara County, 90 Cal. 543, 548, 27 Pac. Rep. 438; Rapp v. Spring Valley G. Co., 74 Cal. 532, 536, 16 Pac. Rep. 325; Chivell v. Spring Valley G. Co., 16 Pac. Rep. 328; Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74 (seventy-five cents for each of twelve separate liens, total $900; nothing in the record to show that it was unreasonable).

Court should not fix fee at unreasonably small or insufficient amount: Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

Attorneys' fees not excessive in consolidated case: See Sweeney v. Meyer, 124 Cal. 512, 57 Pac. Rep. 479.

Colorado. Four hundred dollars for foreclosing sixteen mechanics' liens, aggregating $1,919; judgment by default; held excessive: Los Angeles G. M. Co. v. Campbell, 13 Colo. App. 1, 56 Pac. Rep. 246.

Idaho. Amount recovered, $257.83; attorney's fee, $100 in lower court: Huber v. St. Joseph's Hospital, 11 Idaho 631, 83 Pac. Rep. 768.

lished, for services in the superior and supreme courts.[26] The amounts are to be fixed by the lower court, irrespective of any averment in the complaint;[27] but, on the other hand, it has been held, more recently, that a judgment for attorneys' fees in excess of that claimed in the complaint cannot be sustained.[28] The court, however, is not bound by testimony touching the value of attorneys' services in suits of this nature.[29]

New Mexico. Amount recovered, $232.40; attorney's fee, $100. Amount recovered, $3,790.24; attorneys' fees, $500: Genest v. Las Vegas M. B. Assoc., 11 N. M. 251, 67 Pac. Rep. 743, 745.

Oregon. Amount recovered, $85.75; attorney's fee, $20: Lewis v. Beeman, 46 Oreg. 311, 80 Pac. Rep. 417. Judgment, $220; attorney's fee allowed, $50: Cline v. Shell, 40 Oreg. 372, 73 Pac. Rep. 12, Amounts recovered, $193.05 and $325; attorneys' fees, $25 and $70, respectively: Fitch v. Howitt, 32 Oreg. 396, 52 Pac. Rep. 192. Amount recovered, $559.89; attorney's fee, $75: Harrisburg L. Co. v. Washburn, 29 Oreg. 150, 169, 44 Pac. Rep. 390; Forbes v. Willamette Falls E. Co., 19 Oreg. 61, 23 Pac. Rep. 670, 20 Am. St. Rep. 793 ($10 each for fifteen liens). See Title G. & T. Co. v. Wrenn, 35 Oreg. 62, 56 Pac. Rep. 271, 76 Am. St. Rep. 454 ($250).

Washington. Amount claimed, $21,000; fee, $2,000; excessive; should be $1,000 or less: See Fairhaven L. Co. v. Jordan, 5 Wash. 729, 736, 32 Pac. Rep. 729; Seattle and Walla Walla R. Co. v. Ah Kowe, 2 Wash. Ter. 36, 3 Pac. Rep. 188. Amount recovered, $75.58; attorney's fee, $50; excessive, in absence of evidence: Lee v. Kimball (Wash., March 12, 1907), 88 Pac. Rep. 1121. Amount recovered, $4,328; attorney's fee, $400: Lavanway v. Cannon, 36 Wash. 593, 79 Pac. Rep. 1117.

Attorney's fee reduced from $100 to $50; contest concerning $73: Littell v. Saulsberry, 40 Wash. 550, 82 Pac. Rep. 909.

Attorney's fee based on items contested, and reduced: See Littell v. Saulsberry, 40 Wash. 550, 82 Pac. Rep. 909.

[26] **Kerr's Cyc. Code Civ. Proc.,** § 1195.

Montana. In district court, but not in supreme court: Murray v. Swanson, 18 Mont. 533, 46 Pac. Rep. 441. See Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. Rep. 280 (1889).

[27] Clancy v. Plover, 107 Cal. 272, 274, 40 Pac. Rep. 394; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 234, 39 Pac. Rep. 758; Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144.

See "Complaint," §§ 670 et seq., ante.

Colorado. Judgment for attorneys' fees, without evidence of the services performed and their value, under the law of 1893, cannot be sustained: Burleigh B. Co. v. Merchant B. & B. Co., 13 Colo. App. 455, 59 Pac. Rep. 83, 87.

[28] Skym v. Weske Cons. Co. (Cal., Dec. 18, 1896), 47 Pac. Rep. 116 (decided Dec. 18, 1896), appears **impliedly to overrule,** or at least distinguish, the earlier cases of Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 234, 39 Pac. Rep. 758 (decided March 8, 1895), and Clancy v. Plover, 107 Cal. 273, 274, 40 Pac. Rep. 394 (decided May, 1895), without expressly distinguishing or even noticing them.

[29] In this connection, the supreme court has said: "We think, therefore, that the failure of the plaintiff to produce evidence on the question does not affect the validity of the judgment awarding such

§ 944. Same. Relation of legal services to action. Attorneys' fees paid by a party can be recovered from the defeated party only in exceptional cases, of which the action to enforce a mechanic's lien is one;[30] but the exception provided for in this class of cases does not extend to fees for services not pertaining to such action "in the superior" or "supreme court." Thus —

Preparing of claim of lien to be recorded is no more nearly related to the action to foreclose the lien than is the drafting of the contract for the performance of the labor upon which such action may be partly founded.[31]

§ 945. Same. Agreement as to fees. And the court has held that it is not necessary to the allowance of the attorney's fee that the plaintiff should have actually paid or expressly agreed to pay one to his attorney; an implied agreement is sufficient. "If, indeed, it had appeared that the attorney had expressly agreed to give his services for nothing, or if he were an employee of the plaintiff at a yearly salary, as was the case in Bank of Woodland v. Treadwell[32] [for the foreclosure of a mortgage], then the plaintiff might not be entitled to an allowance for attorney's fee. But where there is an implied agreement for the payment of the attorney, or where, as here, there is an express agreement that for services prior to the recording of the liens, the attorney shall receive five per cent upon the amount collected, and for subsequent services 'only such

fees: See opinion of Harrison, J., in Watson v. Sutro, 103 Cal. 169, 37 Pac. Rep. 201; Rapp v. Spring Valley G. Co., 74 Cal. 532, 16 Pac. Rep. 325. No doubt, such evidence is admissible, and may properly be considered by the court, but its absence in the record on appeal is not a circumstance requiring a reversal, unless it appear from an inspection of the record, and without evidence to sustain it, that the fee fixed by the court is unreasonable, which is not claimed in this instance": Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. Rep. 394. See Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74.

Washington. Evidence as to attorneys' fees seems to be necessary: Wheeler & Co. v. Ralph, 4 Wash. 617, 30 Pac. Rep. 709; Cowie v. Ahrenstedt, 1 Wash. 416, 420, 25 Pac. Rep. 458.

[30] Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144.

Montana. See Murray v. Swanson, 18 Mont. 533, 46 Pac. Rep. 441.

[31] Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144.

[32] 55 Cal. 379.

fee as the court would allow,' it seems clear that plaintiff is entitled to an allowance for attorneys' fees. The court would not be bound by an agreement between plaintiff and his attorney as to amount, but must, under the code, allow such amount as is reasonable." [33]

Stipulation not excluding attorneys' fees. A stipulation that an individual named should ascertain and fix the amount due to each of the plaintiffs, and "upon such ascertainment that judgment shall accordingly be entered," does not prevent the claimant from recovering any attorneys' fees which may be properly allowed by the court.[34]

§ 946. Same. Lower court fixing attorneys' fees in supreme court. It has been held that the superior court has exclusive power to allow the claimant a reasonable attorney's fee for services in the supreme court, notwithstanding Rule XXIV of that court provides that costs be awarded to appellants in cases where the judgment or order appealed from is reversed or modified; and the supreme court has not the power to order any amount to be paid as such fee, and such an order is not binding upon the lower court; [35] and the supreme court will make no direction to the lower court respecting the allowance of attorneys' fees.[36]

[33] Rapp v. Spring Valley G. Co., 74 Cal. 532, 534, 16 Pac. Rep. 325; Chivell v. Spring Valley G. Co. (Cal., Jan. 25, 1888), 16 Pac. Rep. 328.

Washington. "A statutory attorney's fee will not be allowed in addition to the fee provided for in a contract; neither do we think it can be allowed in addition to the fee allowed for the foreclosure": Bolster v. Stocks, 13 Wash. 460, 43 Pac. Rep. 532, 534, 1099.

[34] Rapp v. Spring Valley G. Co., 74 Cal. 532, 534, 16 Pac. Rep. 325.

[35] Schallert-Ganahl L. Co. v. Neal, 94 Cal. 192, 193, 29 Pac. Rep. 622.

Lower court to fix attorneys' fees: Sweeney v. Meyer, 124 Cal. 512, 516, 57 Pac. Rep. 479; San Joaquin L. Co. v. Welton, 115 Cal. 1, 46 Pac. Rep. 735, 1057.

Discretion of lower court as to attorneys' fees not disturbed on appeal, except for abuse: Sweeney v. Meyer, 124 Cal. 512, 515, 57 Pac. Rep. 479.

Application for attorneys' fees in supreme court to be made in lower court: See Williams v. Gaston, 127 Cal. 641, 60 Pac. Rep. 427.

Montana. Attorney's fee for services in appellate court to be fixed by district court on return of remittitur: Hill v. Cassidy, 24 Mont. 108, 60 Pac. Rep. 811.

[36] San Joaquin L. Co. v. Welton, 115 Cal. 1, 46 Pac. Rep. 735, 1057; Evans v. Judson, 120 Cal. 282, 285, 52 Pac. Rep. 585. In West Coast L. Co. v. Newkirk, 80 Cal. 275, 281, 22 Pac. Rep. 231, the supreme court ordered the lower court, on the going down of the remittitur,

§ 947. Same. When owner not liable for attorneys' fees. Where the only question raised by the answer of a landowner in an action to enforce mechanics' liens is decided in his favor, it is improper to impose a lien upon his land for attorneys' fees, in addition to the balance due on a valid original contract, unless the answer was interposed to delay and harass the lien claimants.[37]

to allow plaintiff, respondent, under Code Civ. Proc., § 1195, a reasonable attorney's fee in the supreme court, and this case was mentioned in Schallert-Ganahl L. Co. v. Neal, supra. See Mulcahy v. Buckley, 100 Cal. 484, 490, 35 Pac. Rep. 144. And the lower court had, previous to the rule established, as stated in the text, been ordered to allow, "as additional costs" (Russ L. Co. v. Garrettson, 87 Cal. 589, 596, 25 Pac. Rep. 747; Smith v. Solomon, 84 Cal. 537, 539, 24 Pac. Rep. 286), or "as part of their costs on this appeal" (Harlan v. Stufflebeem, 87 Cal. 508, 513, 25 Pac. Rep. 686; Clark v. Taylor, 91 Cal. 552, 555, 27 Pac. Rep. 860), a reasonable attorney's fee for services of the attorney for respondent.

Washington. Another attorney's fee not allowed on appeal: See Lavanway v. Cannon, 37 Wash. 593, 79 Pac. Rep. 1117.

[37] Hooper v. Fletcher, 145 Cal. 375, 378, 79 Pac. Rep. 418.

See § 934, ante.

CHAPTER XLIV.

SALE AND REDEMPTION.

§ 948. Sale. In general.
§ 949. Same. Manner of executing judgment.
§ 950. Same. "Writ" not an "execution."
§ 951. Same. Time of sale.
§ 952. Same. Application of proceeds to junior executions.
§ 953. Same. Sale of leasehold interest.
§ 954. Right of redemption.
§ 955. Same. Redemption by subsequent mortgagee not made a party.

§ 948. Sale. In general.[1] The provisions of part two of the Code of Civil Procedure of California, with reference

[1] See "Decree," §§ 930 et seq., ante.

Colorado. As on executions: Keystone M. Co. v. Gallagher, 5 Colo. 23 (1872); San Juan Co. v. Finch, 6 Colo. 214.

Void order of sale, directing distribution of proceeds pro rata: Bassick M. Co. v. Schoolfield, 10 Colo. 46, 14 Pac. Rep. 65 (under Gen. Stats., § 2155), **reviewed** in Staples v. Ryan, 62 Fed. Rep. 635, holding that the sale was not void, on the gound that by such sale the person claiming a lien against only a portion of the property shared in the proceeds of the whole property of which his complaint did not give the court jurisdiction, but that it might be voidable.

As to buying property in under foreclosure sale not being "payment," see Orman v. Ryan, 25 Colo. 383, 55 Pac. Rep. 168.

Impeaching record; publication of notice of sale: See Ryan v. Staples, 76 Fed. Rep. 721, 23 C. C. A. 541, **affirming** s. c. 62 Fed. Rep. 635.

Execution on personal judgment: Finch v. Turner, 21 Colo. 287, 40 Pac. Rep. 565.

Order marshaling assets of sale of land and building: See Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419, 423.

Montana. Personal judgment against husband only, in action to foreclose lien against husband and wife; enjoining sale: See Alexander v. Fransham, 26 Mont. 496, 68 Rep. 945. See Vantilburgh v. Black, 2 Mont. 371.

New Mexico. Publication of notice of sale: See Neher v. Crawford, 10 N. M. 725, 65 Pac. Rep. 156.

Oregon. As to sale of lot separate from building, and application of proceeds to the payment of a prior mortgage, and surplus, together with proceeds of sale of building, applied to the satisfaction of mechanics' liens, see Smith v. Wilkins, 38 Oreg. 588, 64 Pac. Rep. 761, s. c. 31 Oreg. 421, 51 Pac. Rep. 438.

General execution: Kendall v. McFarland, 4 Oreg. 293.

Utah. Sale and removal of building from lot: See Sanford v. Kunkel, 30 Utah 379, 85 Pac. Rep. 363, 1012.

to sale,[2] are generally applicable to the foreclosure of liens for labor performed upon or materials furnished for improvements on real property.[3]

§ 949. Same. Manner of executing judgment. In reference to this matter, the court has said: "The code provisions relating to the foreclosure of mechanics' liens provide no mode of enforcing the judgment, other than by a sale of the property and docketing a deficiency judgment against the defendant who may be liable therefor; and in Phillips on Mechanics' Liens, section four hundred and fifty-eight, it is said: 'The execution to be issued for the enforcement of the lien is generally provided for by express enactment. . . . Unless otherwise provided, the execution is always special against the particular property encumbered with the lien.' I conclude, therefore, that an execution as upon a mere personal judgment could not have been issued and levied upon the property of the defendant [owner of a leasehold interest], had the undertaking in question not been given, unless by direction of the court, upon a show-

As to sale of different parcels subject to different rights of claimants, see Sanford v. Kunkel, 30 Utah 379, 85 Pac. Rep. 363, 1012.

Sale upon subsequent decree upon reinstating one of several separate claims, dismissed, sale having been decreed upon the other: Venard v. Green, 4 Utah 67, sub nom. Venard v. Old Hickory M. Co., 6 Pac. Rep. 415, 7 Pac. Rep. 408.

Washington. Injunction will not lie to restrain the sale of community real estate against which a decree of sale had been entered in a proceeding for the foreclosure of a mechanic's lien to which the owner's wife had not been made a party, her rights not being affected by the judgment, and the judgment not being void: Turner v. Bellingham Bay L. & M. Co., 9 Wash. 484, 37 Pac. Rep. 674; since, in the mechanic's-lien case, the limit of time is very short for the commencement of the action, and the issuance of the injunction would have the effect to defeat forever the lien, and a court of equity ought to interfere on behalf of parties only whose rights can be fully protected in the manner pointed out, and the issuance of the injunction being in the sound discretion of the court: Concurring opinion of Stiles, J., in Harrington v. Johnson, 10 Wash. 545, 39 Pac. Rep. 141. As to enjoining sale, although judgment is void, see also Quinby v. Slipper, 7 Wash. 475, 35 Pac. Rep. 116, 38 Am. St. Rep. 899.

General creditor foreclosing lien; general execution for balance unsatisfied: See Marks v. Pence, 31 Wash. 426, 71 Pac. Rep. 1096.

[2] See **Kerr's Cyc. Code Civ. Proc.,** §§ 681 et seq., and notes.

[3] **Kerr's Cyc. Code Civ. Proc.,** § 1189.

ing that the property upon which the lien was adjudged was no longer available, and that the bond given did not operate to stay the enforcement of the lien upon the property described in the judgment."[4]

§ 950. **Same. "Writ" not an "execution."** The only process allowed in the state of California for the enforcement of a judgment foreclosing a lien upon specific property is that laid down by section six hundred and eighty-four,[5] providing that when a judgment requires the sale of property, the same may be enforced by a writ reciting the judgment, or the material parts thereof, and directing execution thereof by the sale. This "writ" is neither styled an "execution," within the meaning of section six hundred and eighty-three,[6] nor is it such in its nature, and the requirement of the section last cited, that the "execution" be made returnable within sixty days, is inapplicable. Hence where the sheriff sells the property after the return-day of the writ, in the absence of some showing that injury has resulted from delay in making the sale, it will not be set aside nor held invalid.[7]

§ 951. **Same. Time of sale.** Where the sheriff sells property under an execution after the return-day, it is not invalid, if the levy was made during the lifetime of the writ; and the same reasoning upholds a sale after the return-day of a writ issued under an order of sale, or in cases where no levy is required.[8] The court having the right to subject the property to a sale for the satisfaction of a decree foreclosing a mechanic's lien, and having at all times control of its process to prevent it from becoming a source of injury, the time within which such sale is directed to be made is

[4] Central L. & M. Co. v. Center, 107 Cal. 193, 197, 40 Pac. Rep. 334.

Colorado. See Finch v. Turner, 21 Colo. 287, 40 Pac. Rep. 565.

[5] Kerr's Cyc. Code Civ. Proc., § 684.

[6] Kerr's Cyc. Code Civ. Proc., § 683.

[7] Southern Cal. L. Co. v. Ocean Beach H. Co., 94 Cal. 217, 29 Pac. Rep. 627, 28 Am. St. Rep. 115.

[8] Southern Cal. L. Co. v. Ocean Beach H. Co., 94 Cal. 217, 29 Pac. Rep. 627, 28 Am. St. Rep. 115.

but directory, and under the control of the court; and, in the absence of a showing of injury, a sale should not be set aside, merely because it was not made before the return-day of the writ.[9]

The deed at the sale, by relation, takes effect as of the time when the lien attached.[10]

§ 952. Same. Application of proceeds to junior executions. As a general proposition, if an execution be levied upon a sufficient amount of personal property to satisfy it in full, such a levy is equivalent to satisfaction. This is not true, however, as in favor of a judgment debtor, in a case where he had subsequently withdrawn the property levied upon, either with or without the consent of the plaintiff in execution; so, too, where the levy had been subsequently relinquished by his consent, so as to allow other and junior liens to be satisfied. Hence where judgments on mechanics' liens are situated in time between prior and subsequent judgments, and a levy under execution on the prior judgments is made on personal property sufficient to satisfy it, and levies under executions on the subsequent judgments are then made, and the plaintiff's attorney in the prior judgments directs that the fund be applied in part to satisfy judgments junior to the mechanics' liens, the senior judgment will be considered satisfied as against such mechanics' liens.[11]

Purchaser having notice of facts affecting priorities. Where a sale of real estate under execution is made nominally to a third person, with a view of complicating the proceedings, but really to a defendant, a judgment creditor in another action, who makes application of the sum due on his judgment in payment on the sale, the third person will be considered to have notice of all the facts touching the ranking or priorities of junior and senior judgments, and

[9] Southern Cal. L. Co. v. Ocean Beach H. Co., 94 Cal. 217, 29 Pac. Rep. 627, 28 Am. St. Rep. 115.

[10] Purser v. Cady (Cal., June 17, 1897), 49 Pac. Rep. 180.

Deed: Finch v. Turner, 21 Colo. 287, 40 Pac. Rep. 565. And is paramount to all encumbrances put upon the property after the commencement of the work: Cornell v. Conine-Eaton L. Co., 9 Colo. App. 225, 235, 47 Pac. Rep. 912.

[11] Barber v. Reynolds, 44 Cal. 519, 534.

sales thereunder, of which such judgment creditor had knowledge.[12]

§ 953. Same. Sale of leasehold interest. It is possible that the owner of the fee, where a building is erected by a lessee with the knowledge but without objection of the owner, under section eleven hundred and ninety-two,[13] may be entitled to have the leasehold interest first sold to satisfy the lien, if he asks for such sale;[14] but where the lease has expired, or has not been renewed, there is no interest of the lessee to be sold.[15]

§ 954. Right of redemption. The decree in an action to enforce mechanics' liens cannot absolutely bar and foreclose the owner of all right and equity of redemption of the premises, but from and after the delivery of the sheriff's deed after the sale, as provided in the decree.[16]

§ 955. Same. Redemption by subsequent mortgagee not made a party. A subsequent mortgagee would have a right, in a proper case, to redeem the premises from the sale under a judgment on the lien, by paying the money justly due, interest, costs, etc., even when he had not been a party to the suit by the lien-holder.[17]

[12] Barber v. Reynolds, 44 Cal. 519, 534.

Oregon. Contra, under act of 1874: Inverarity v. Stowell, 10 Oreg. 261; there being no express provision allowing the sale of the improvements. See Willamette Falls Co. v. Riley, 1 Oreg. 183.

[13] **Kerr's Cyc. Code Civ. Proc.,** § 1192.

[14] West Coast L. Co. v. Apfield, 86 Cal. 335, 340, 24 Pac. Rep. 993.

Colorado. Sale of improvements, where there is a prior encumbrance: Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519. See Church v. Smithea, 4 Colo. App. 175, 35 Pac. Rep. 267.

[15] Evans v. Judson, 120 Cal. 282, 285, 52 Pac. Rep. 585.

[16] Castagnetto v. Coppertown M. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74.

Colorado. Right of redemption of stranger to writ of error, who holds another judgment: See Ryan v. Staples, 76 Fed. Rep. 721, 23 C. C. A. 541, **affirming** Staples v. Ryan, 62 Fed. Rep. 635.

[17] Gamble v. Voll, 15 Cal. 508, 510. See **Kerr's Cyc. Code Civ. Proc.,** §§ 701 et seq.

Montana. Right of purchaser at sale to remove improvements: Grand Opera House Co. v. McGuire, 14 Mont. 558, 37 Pac. Rep. 607. It is not affected by the fact that the removal would involve great loss: Id. Redemption: See Mason v. Germaine, 1 Mont. 269 (1865).

Oregon. Redemption; priority of mortgage: See Gaines v. Childers, 38 Oreg. 200, 63 Pac. Rep. 487.

CHAPTER XLV.

APPEAL.

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§ 956. Appeal. In general.[1] Statutory provisions. Section eleven hundred and ninety-nine[2] provides: "The provisions of part two of this code relative to new trials and appeals,[3] except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter" (on mechanics' liens).[4] While the provisions of the statute are found in part three, entitled "Special Proceedings," yet by section eleven hundred and ninety-eight[5] the provisions of part two relating to practice in civil actions are applicable, except where changed by the chapter on mechanics' liens.[6]

§ 957. Error, how reviewed. Exclusion of evidence. The rulings of the court upon the exclusion of evidence as to the extent of the owner's liability under a valid contract, which has been abandoned by the contractor, may be pre-

[1] See, generally, "Findings," §§ 885 et seq., ante.

Law of the case; doctrine expounded: See Tally v. Ganahl (Cal. Sup., June 19, 1907), 90 Pac. Rep. 1049. See Tally v. Parsons, 131 Cal. 516, 63 Pac. Rep. 833.

As to "law of the case," for full collection of cases and criticism, see **Kerr's Cyc. Code Civ. Proc.,** § 53, note pars. 94-106.

Separate judgments, mortgages, and mechanics' liens; apportionment of costs on appeal: See McClain v. Hutton, 131 Cal. 132, 139, 63 Pac. Rep. 182, 622, 61 Id. 273.

Colorado. Rule laid down by state courts followed by Federal courts: See Ryan v. Staples, 76 Fed. Rep. 721, 23 C. C. A. 541, **affirming** Staples v. Ryan, 62 Fed. Rep. 635.

Change of theory as to the basis of right to lien not to be made on appeal; lessor corporation and lessee corporation practically the same, making improvement: See Antlers Park Regent M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226.

New Mexico. Law of the case: See Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

Oregon. Decree binding as to those not appealing, although modified after appeal for the benefit of appellant: Smith v. Wilkins, 38 Oreg. 583, 64 Pac. Rep. 760.

[2] **Kerr's Cyc. Code Civ. Proc.,** § 1199.

[3] See **Kerr's Cyc. Code Civ. Proc.,** §§ 936 et seq., and notes.

[4] **New Mexico.** See Bucher v. Thompson, 7 N. M. 115, 32 Pac. Rep. 498.

[5] **Kerr's Cyc. Code Civ. Proc.,** § 1198.

[6] See "Time, Place, and Manner of Commencing Actions," §§ 649 et seq., ante; "Practice," §§ 864 et seq., ante.

sented by a bill of exceptions, when the judgment and order denying a new trial are appealed from, notwithstanding that the appeal from the judgment was not taken within sixty days.[7]

§ 958. **Same. Writ of review.** A writ of review may be granted where the court "has exceeded the jurisdiction of such tribunal, . . . and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy"; but erroneous judgments cannot be corrected by this writ, where the court had jurisdiction of the cause, but error must be corrected by appeal.[8] Thus —

Foreclosing lien on land and fund. The writ of review will not lie, where an action is brought by material-men against the owner and contractor to foreclose a lien for materials furnished, and to reach funds due to the contractor in the hands of the owner of the building, upon the service of notice as prescribed in section eleven hundred and eighty-four.[9]

§ 959. **Parties to appeal.** In order to confer jurisdiction upon the court to entertain an appeal, all adverse parties — parties to the controversy whose interests would be injuriously affected by a reversal of the judgment — must be brought before the court, under section nine hundred and forty.[10]

§ 960. **Same. Definition of adverse party.** An adverse party to an appeal means a party whose interest in relation to the subject of the appeal is in conflict with a reversal of the order or the decree appealed from, or the modification sought by the appeal.[11]

[7] McDonald v. Hayes, 132 Cal. 490, 496, 64 Pac. Rep. 850.

[8] Weldon v. Superior Court, 138 Cal. 427, 429, 71 Pac. Rep. 502.

[9] Weldon v. Superior Court, 138 Cal. 427, 429, 71 Pac. Rep. 502.

Colorado. Decree of foreclosure and sale of property, final judgment, reviewable upon appeal or by writ of error by owner, even when not bound by personal judgment: Marean v. Stanley, 34 Colo. 91, 81 Pac. Rep. 759.

[10] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983.

[11] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983.

See Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. Rep. 758;

§ 961. Same. Appeal from judgment denying lien. Death of one personally liable. Where the appellant was a material-man, who recovered a personal judgment against the contractor and subcontractor, but failed to establish his lien, and the appeal was from the judgment denying the lien, the fact that the subcontractor dies does not prevent the court from proceeding with the appeal until some one is substituted to represent the subcontractor, as he is not interested in the appeal; nor is his presence, or that of his representative, necessary to a full determination of the appeal.[12]

§ 962. Notice of appeal.[13] Contents. Sale of property. Where the plaintiff, in his notice, appeals from that por-

Randall v. Hunter, 69 Cal. 80, 82, 10 Pac. Rep. 130; Green v. Berge, 105 Cal. 52, 38 Pac. Rep. 539, 45 Am. St. Rep. 25; Mohr v. Byrne, 132 Cal. 250, 64 Pac. Rep. 257.

See also **Kerr's Cyc. Code Civ. Proc.,** § 940, note, p. 1423.

Colorado. Owner heard on appeal; default judgment attacked; work done for lessee: See Schweizer v. Mansfield, 14 Colo. App. 236, 59 Pac. Rep. 843.

Appeal taken from judgment foreclosing lien; persons against whom personal judgment rendered not aggrieved: See Davidson v. Jennings, 27 Colo. 187, 60 Pac. Rep. 354, 83 Am. St. Rep. 49, 48 L. R. A. 340.

Oklahoma. Unnecessary parties to appeal: See Savage v. Dunkler, 12 Okl. 463, 72 Pac. Rep. 366; Humphrey v. Hunt, 9 Okl. 196, 59 Pac. Rep. 971.

[12] Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 643, 22 Pac. Rep. 860.

[13] **Colorado.** Right to appeal; consolidated action: Orman v. Crystal R. R. Co., 5 Colo. App. 493, 39 Pac. Rep. 434.

Oregon. An unperfected appeal does not exhaust the right of appeal: Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Pac. Rep. 190, 42 Pac. Rep. 997.

Waiver of appeal by attaching property: Ehrman v. Astoria & P. R. Co., 26 Oreg. 377, 38 Pac. Rep. 306.

Washington. Premature and ineffectual notice does not exhaust right: Griffith v. Maxwell, 20 Wash. 403, 55 Pac. Rep. 571. See Tacoma L. & Mfg. Co. v. Wolff, 5 Wash. 264, 31 Pac. Rep. 753, 33 Pac. Rep. 507. Appeal by wife: See Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. Rep. 186.

A contractor not joining in an appeal was held not to be entitled to derive any benefit therefrom, except from the necessities of the case, under the statute then in force: Littell v. Miller, 8 Wash. 566, 569, 36 Pac. Rep. 492.

Appeal. Account in controversy. Appeal was allowed in action to foreclose mechanics' liens, although the amount in controversy did not exceed the sum of $200: Fox v. Nachtsheim, 3 Wash. 684, 29 Pac. Rep. 140.

tion of the judgment which determines the existence of the lien and its priority over plaintiff's lien, but omits to appeal from that part of the judgment ordering the sale of the property, the court, on appeal, will not consider the correctness of the portion so omitted.[14]

§ 963. Same. Personal judgment against contractor. Where the notice of appeal was limited in its language to an appeal from a judgment of dismissal as to the owner, and his recovery from the claimant of costs of suit, and the claimant appeals "from the whole of said judgment, and every part thereof," the appeal was not taken from that portion thereof which was rendered personally against the contractors, and will be entertained, although notice thereof was not served on them.[15]

§ 964. Same. Upon whom served.[16] The notice of appeal must be served on every adverse party interested in the judgment, who would be affected by its reversal, and if not so served, the appeal must be dismissed.[17]

§ 965. Same. Contractor not adverse party. It has recently been held that it is of no moment to the contrac-

[14] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 237, 39 Pac. Rep. 758.

[15] Roylance v. San Luis H. Co., 74 Cal. 273, 276, 20 Pac. Rep. 573.

[16] **Oregon.** Under Hill's Code, § 537, notice of appeal had to be served upon all lien claimants, as they are "adverse parties," and might be affected by a modification or reversal of the decree: Osborn v. Logus, 28 Oreg. 302, 37 Pac. Rep. 456, 38 Pac. Rep. 190, 42 Pac. Rep. 997, **citing** The Victorian, 24 Oreg. 121, 32 Pac. Rep. 1040, 41 Am. St. Rep. 838; and jurisdiction must be determined from the conditions existing at the time the appeal is taken. A contractor, not served with summons, nor appearing, though named in the pleadings as a defendant, but against whom there is no decree, is not an adverse party: Id. See Hand Mfg. Co. v. Marks, 36 Oreg. 523, 52 Pac. Rep. 512.

Likewise where no relief is sought against the contractor by the owner, and the former defaults: Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649.

Washington. So as to intervener without leave of court: Gray's Harbor C. Co. v. Wotton, 14 Wash. 87, 43 Pac. Rep. 1095.

See **Kerr's Cyc. Code Civ. Proc.,** §§ 940 et seq., and notes. See Davies-Henderson L. Co. v. Gottschalk, 81 Cal. 641, 643, 22 Pac. Rep. 860.

[17] Lancaster v. Maxwell, 103 Cal. 67, 68, 36 Pac. Rep. 951, 37 Id. 207.

tor whether, upon appeal by the owner from so much of the judgment as creates the lien of his subclaimant, it be determined that the lien is valid or invalid, or whether the judgment be affirmed or reversed, and that, under section eleven hundred and ninety-three,[18] if the judgment establishing the lien stands, and is enforced by a sale of the property, or is discharged by the owner through payment of the judgment, the owner is entitled to reimburse himself from the moneys in his hands due the contractor, upon whom is the primary obligation to pay his subclaimants. Hence it is held that the original contractor, under these circumstances, is not an adverse party upon whom notice of appeal must be served;[19] but the doctrine stated in this form is doubted.

§ 966. **Same. Contractor adverse party. Default.** In an action by a subclaimant to foreclose a mechanic's lien, where the original contractor defaults, and judgment is rendered for the sale of the property, and that judgment for the deficiency be docketed against the contractor, if the owner of the building appeals from that part of the judgment which decrees that the property be sold, it has been held that the contractor is an adverse party who would be affected by its reversal, and must be served with the notice of appeal.[20] This holding, however, must be considered against the weight of authority and the reason of the rule,

[18] **Kerr's Cyc. Code Civ. Proc.,** § 1193.

[19] Mannix v. Tryon (Cal. Sup., Sept. 19, 1907), 91 Pac. Rep. 983, **distinguishing** Lancaster v. Maxwell, 103 Cal. 67, 36 Pac. Rep. 951, and stating that it did not appear in that case that any personal judgment was rendered against the original contractor, fixing the primary liability on his part to the subcontractor for the entire amount of his claim, or personal judgment rendered for such a deficiency as may appear after the sale of the property; but the case fails to bear out this last statement. Furthermore, default against the original contractor was taken, but no notice of this fact was taken in the case first cited.

See §§ 966, 969, post.

Oregon. Defaulting contractor not necessary party to appeal, when facts entitling owner to relief against contractor not pleaded: See Cooper Mfg. Co. v. Delahunt, 36 Oreg. 402, 51 Pac. Rep. 649.

[20] Lancaster v. Maxwell, 103 Cal. 67, 68, 36 Pac. Rep. 951.

See note § 965, ante; § 969, post.

as by his default the contractor admits all the allegations of the complaint to be true.

§ 967. **Same. Subsequent mortgagee. Injuriously affected.** Where, in a suit to foreclose a mortgage against a defendant, mortgager and grantor of the property, to a corporation defendant, and against claimants of mechanics' liens upon the property, the latter liens are determined to be prior to such mortgage, and deficiency judgments are ordered docketed in favor of the plaintiff against the mortgager, and also in favor of the lien claimants against the corporation, an appeal from that portion of the judgment which determines that the lien claimants have any lien upon the premises, and giving their liens priority over the mortgage, cannot be considered, where the plaintiff's notice of appeal was not served either upon the defendant mortgager, or upon the grantee, the corporation defendant; for a modification of such judgment awarding priority to the plaintiff's mortgage would have the effect of changing the personal liability of the mortgager and grantee, in case of insufficiency of proceeds to satisfy the liens, and would injuriously affect the interests of the grantee. The court, on appeal, under such circumstances, can have no jurisdiction to render the judgment, unless the parties to be affected thereby are before it.[21]

§ 968. **Same. Beneficially affected.** Under the circumstances mentioned in the last section, an appeal from that portion of the judgment which determines that the claimants have a lien upon the mortgaged premises will be entertained, where the defendant grantee is not served with notice of appeal; for if the mortgagee, as it has a right to do, falsify any of the mechanics' liens for the purpose of reducing the amount to be appropriated out of the proceeds of the sale before making any application therefrom to its own claim, even in the absence of the grantee, if it can be done without injuring such grantee, the modification would not be adverse to its interests; and, under such circum-

[21] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 229, 231, 39 Pac. Rep. 758.

stances, to the extent that the obligation of the grantee may be extinguished, the mortgagee is entitled to have the judgment modified.[22]

§ 969. **Same. Who need not be served with notice of appeal.** Defendants not served with process, and not appearing, and against whom no judgment is taken, need not be served with notice of appeal.[23] Thus —

Contractor, not served, nor appearing, and no judgment rendered against him. Where the owner appeals from a judgment enforcing a mechanic's lien against his property, the contractor, being a party defendant, and not being served with summons, nor appearing, and no judgment being taken against him, need not be served with notice of appeal.[24]

§ 970. **Same. Service waived by stipulation.** Where several actions to enforce mechanics' liens are consolidated, and each plaintiff recovers judgment, and where there appears in the transcript on appeal in one case a stipulation sufficiently broad to make the judgment in the other case follow the judgment in the case appealed, such stipulation is an appearance by the plaintiff in the other case to the appeal, and the respondent in the case appealed cannot move to dismiss the appeal because notice of appeal was not served upon the plaintiff in the other case.[25]

§ 971. **Bond for costs. Staying judgment. Lien subordinate to lien foreclosed.** Where an undertaking for costs and damages is filed under section nine hundred and forty-one,[26] it stays proceedings on the appeal in all cases, except

[22] Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 229, 231, 39 Pac. Rep. 758.

[23] Nason v. John, 1 Cal. App. 538, 540, 82 Pac. Rep. 566.

[24] Nason v. John, 1 Cal. App. 538, 540, 82 Pac. Rep. 566. See Terry v. Superior Court, 110 Cal. 85, 42 Pac. Rep. 464; Hinkel v. Donohue, 88 Cal. 597, 26 Pac. Rep. 374; Merced Bank v. Rosenthal, 99 Cal. 39, 31 Pac. Rep. 849, 33 Id. 732; Clarke v. Mohr, 125 Cal. 540, 58 Pac. Rep. 176.

[25] Valley L. Co. v. Struck, 146 Cal. 266, 269, 80 Pac. Rep. 405.

Colorado. Record on appeal; record in one case the same as others; stipulation to save costs; one record sufficient: See Little Valeria G. M. & M. Co. v. Ingersoll, 14 Colo. App. 240, 59 Pac. Rep. 970.

[26] See Kerr's Cyc. Code Civ. Proc., § 941, and note.

those provided for in section nine hundred and forty-two to nine hundred and forty-five,[27] the property not being perishable; and where an appeal is taken from a judgment enforcing a mechanic's lien, and ordering the sale of the premises subject to the lien, by a subsequent lien-holder out of possession of the property, such undertaking stays the judgment.[28]

§ 972. Stay bond. Lien enforced. Under section nine hundred and forty-five,[29] relating to appeals from judgments for the sale of real estate, a bond to stay the execution upon appeal from such decree enforcing a lien must be given; and a bond conditioned in twice the amount of the judgment against the owner of the land, but not conditioned as required by that section, does not operate to stay the enforcement of the lien upon the property described in the judgment.[30]

§ 973. Insufficient record. Compliance with specifications. Void contract. Where an appeal from a judgment in favor of the original contractor is taken by an owner, under a void statutory original contract, if no copy of the plans and specifications is contained in the record, which prima facie shows, in connection with the contract alleged and not denied, that the plaintiffs performed the work and

[27] See **Kerr's Cyc. Code Civ. Proc.,** §§ 942-945, and notes.

[28] Root v. Bryant, 54 Cal. 182, 184, 1 Pac. Coast L. J. 43. See City of Los Angeles v. Pomeroy, 132 Cal. 340, 341, 64 Pac. Rep. 477.

Bond void, judgment reversed, with directions to enter judgment for defendant: Hampton v. Christensen, 148 Cal. 729, 740, 84 Pac. Rep. 200. See Shaunessy v. American S. Co., 138 Cal. 543, 69 Pac. Rep. 701.

See "Constitutional Aspects," § 39, ante; "Bond," §§ 281 et seq., ante; "Sureties," §§ 605 et seq., ante.

Montana. Insufficient bond; dismissal: See Hill v. Cassidy, 24 Mont. 108, 60 Pac. Rep. 811.

Washington. Failure of clerk to mark bond as filed, not affecting right of appeal: See Main I. Co. v. Olsen (Wash., Sept. 28, 1906), 86 Pac. Rep. 1112.

[29] See **Kerr's Cyc. Code Civ. Proc.,** § 945, and note.

[30] Central L. & M. Co. v. Center, 107 Cal. 193, 198, 40 Pac. Rep. 334. See Corcoran v. Desmond, 71 Cal. 100, 102, 11 Pac. Rep. 815.

Nevada. See Arrington v. Wittenberg, 11 Nev. 285.

Washington. Sufficient bond on appeal and to stay: See Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 421.

substantially complied with their contract, the court cannot determine that some of the specifications were not complied with.[31]

§ 974. **Presumptions on appeal. In general.** Upon appeal, the usual presumptions are indulged in favor of the judgment foreclosing a mechanic's lien on real property. Thus —

Lien on real property. Where the court finds that the lien claimed is for painting and papering the walls and other portions of the basement story of a building, and "certain structures or articles affixed and appurtenant thereto and placed thereon," and it appears that some work was performed upon "counters, sideboard, shelving, ice-box, partitions, and wainscoting," but there is nothing to show that they were not among the articles affixed and appurtenant thereto, the court, upon appeal from the judgment, will presume that the evidence supported the decision, and that the lien is not given for work upon personal property.[32]

[31] Camp v. Behlow, 2 Cal. App. 699, 701, 84 Pac. Rep. 251.

Agreed statement not controlling court on appeal: See San Francisco L. Co. v. Bibb, 139 Cal. 325, 72 Pac. Rep. 964.

Transcript failing to show motion or order; dismissal: See Valley L. Co. v. Struck, 146 Cal. 266, 269, 80 Pac. Rep. 405.

Arizona. Appeal; time for filing transcript: See Prescott Nat. Bank v. Head (Ariz., May 25, 1907), 90 Pac. Rep. 328.

Colorado. Appeal; lienable and non-lienable charges in same judgment: See Antlers Park Regent M. Co. v. Cunningham, 29 Colo. 284, 68 Pac. Rep. 226.

Washington. Record not before court; order denying motion for new trial not considered: See Seattle L. Co. v. Sweeney, 43 Wash. 1, 85 Pac. Rep. 677.

Dismissal as to one defendant; answer not in record; question not reviewed: See Knudson-Jacob Co. v. Brandt (Wash., Sept. 25, 1906), 87 Pac. Rep. 43.

Personal judgment against wife held not reviewable on appeal, without exception, in action to foreclose architect's lien: See Spalding v. Burke, 33 Wash. 679, 74 Pac. Rep. 829.

[32] Sidlinger v. Kerkow, 82 Cal. 42, 45, 22 Pac. Rep. 932. See Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

Finding that materials of a specified value were furnished by the claimant of a lien upon a dwelling-house to be used in its construction is not inconsistent with a finding that part of them were furnished by another party, who refused to deliver the same until paid for, and that the claimant paid such other party therefor; and it must be presumed, in support of both findings, where the appeal is upon the judgment roll without a bill of exceptions, that the evidence showed that the claimant of the lien received and furnished a portion

§ 975. **Same. Extent of land.** The court will presume, upon appeal, that the land described in the decree for the sale of the premises upon foreclosure of mechanics' liens is not greater in extent that that covered by the building, if there is nothing in the record to show that such is the case; as every presumption must be indulged in favor of the judgment; which will not be reversed because there is no allegation, either in the complaint or in the answer, or finding, that such land was necessary for the convenient use and occupation of the building.[33]

Land necessary for occupation. Where a house is described with sufficient certainty in the claim of lien, a case will not be reversed because it does not appear how much land is necessary for its occupation.[34]

§ 976. **Same. Support of findings.** Where there is no evidence before the supreme court, the findings of the lower court will be taken as true.[35]

Reputed owner. It will be presumed, in support of the findings, that the person named in a claim of lien was the

of the materials; and likewise it must be presumed that the description of the land in the claim of lien is "sufficient for identification": Avery v. Clark, 87 Cal. 619, 629, 25 Pac. Rep. 919, 22 Am. St. Rep. 272.

Colorado. Presumption as to amendment of complaint and pleading thereto: Bitter v. Mouat L. & I. Co., 10 Colo. App. 307, 51 Pac. Rep. 519.

Idaho. Lowe v. Turner, 1 Idaho 107.

Montana. See Mason v. Germaine, 1 Mont. 269.

Utah. Findings not before appellate court; presumption that they are supported by evidence, except where conflicting: Culmer v. Caine, 22 Utah 216, 61 Pac. Rep. 1008, **citing** Blethen v. Blake, 44 Cal. 117.

[33] Sachse v. Auburn, 95 Cal. 650, 651, 30 Pac. Rep. 800; Ward v. Crane, 118 Cal. 676, 680, 50 Pac. Rep. 839.

[34] Newell v. Brill, 2 Cal. App. 61, 64, 83 Pac. Rep. 76. See Sidlinger v. Kerkow, 82 Cal. 42, 22 Pac. Rep. 932.

[35] Thus a finding as to whether the contract was performed, or whether the labor and materials were furnished to the owner through his authorized agent, or to the contractor, must be taken as true: Green v. Clifford, 94 Cal. 49, 51, 29 Pac. Rep. 331.

Presumption as to reasonableness of attorneys' fees, nothing in the record to the contrary: Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74.

Unreasonableness cannot be shown on judgment roll alone, but by bill of exceptions or otherwise: Id.

Colorado. See Charles v. Hallack L. & Mfg. Co., 22 Colo. 283, 43 Pac. Rep. 548.

reputed owner at the time the contract was made, though another person was found to have been a prior reputed owner.[36]

A defense not pleaded cannot be availed of on appeal, notwithstanding evidence given on appellant's part to prove it.[37]

§ 977. **Same. For what work amount found due.** In an action by a contractor to foreclose liens for grading blocks of land, and the streets surrounding the same, under two contracts, where a mortgagee sought priority over the lien of the contractor for grading such streets, on the ground that the contract for the latter work was made subsequent to the recordation of his mortgage, and the court found the amount that was unpaid under the contracts for grading, but did not find that any portion of this unpaid sum was for grading the streets, to support the judgment, rather than to defeat it, the finding will be construed as a finding that the entire amount unpaid was on the block-grading contract, where the appellant failed to make his objection to the finding in the court below.[38]

§ 978. **Same. What not presumed on appeal.** However, where the court finds that a contract was entered into for the construction of certain work, and that it was performed, it will not be presumed, upon appeal, without proof, that the contract was void for want of filing, or for any other reason.[39]

Service of notice on owner. Under the circumstances just set forth, the court will not presume, on appeal, without proof, that some notice other than that expressly found by the court, and prior to it in point of time, was served on the owner.[40]

[36] Kelly v. Lemberger (Cal., Sept. 15, 1896), 46 Pac. Rep. 8.

[37] Kelley v. Plover, 103 Cal. 35, 37, 36 Pac. Rep. 1030 (defense of guaranteeing performance, and non-performance).

[38] Warren v. Hopkins, 110 Cal. 506, 42 Pac. Rep. 986.

[39] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 64, 40 Pac. Rep. 45, 48.

[40] First Nat. Bank v. Perris Irr. Dist., 107 Cal. 55, 64, 40 Pac. Rep. 45, 48.

Agency of employer. Where the trial court fails to find upon the material issue of the agency of the employer of a miner in a mining claim to act for the owner, the court, on appeal, will not indulge in presumptions as to such agency.[41]

§ 979. **What not involved. Validity of deficiency judgment against contractor. Appeal by owner.** It has been held that, upon appeal by the owners of the property, in an action to foreclose a mechanic's lien, the validity of a deficiency judgment against the contractor, that may arise after the sale of the structure, and which does not purport to be against the appellants, which, as to them, is only against the building, will not be noticed.[42]

§ 980. **Findings. When objections not considered.** The court, upon appeal, will adopt the finding of the lower court, where the evidence taken in the trial court is conflicting.[43]

[41] Reese v. Bald Mt. Consol. G. M. Co., 133 Cal. 285, 289, 65 Pac. Rep. 578 (before the amendment of 1903 to **Kerr's Cyc. Code Civ. Proc.**, § 1183).

[42] Linck v. Meikeijohn, 2 Cal. App. 506, 508, 84 Pac. Rep. 309.

What cannot be considered upon appeal from order denying new trial: See Williams v. Hawley, 144 Cal. 97, 99, 77 Pac. Rep. 762 (person entitled to a lien).

Colorado. What not considered on appeal as to contract not set out in record: See Merriner v. Jeppson, 19 Colo. App. 218, 74 Pac. Rep. 341.

Washington. Request of plaintiff of dismissal of foreclosure suit, without reservation of right to personal judgment; demand for reversal to obtain personal judgment cannot be made on appeal: See Service v. McMahon, 42 Wash. 452, 85 Pac. Rep. 33.

[43] Skym v. Weske Consol. Co. (Cal., Dec. 18, 1896), 47 Pac. Rep. 116.

In Knowles v. Joost, 13 Cal. 620, it was held that a finding of a referee is conclusive as to the facts on conflicting evidence.

The rule of the text applied to a finding of performance: Harlan v. Stufflebeem, 87 Cal. 508, 511, 25 Pac. Rep. 686; Adams v. Burbank, 103 Cal. 646, 649, 37 Pac. Rep. 640. So a finding that the claim of a subclaimant was not filed within thirty days after the completion of the structure, is conclusive: Harmon v. San Francisco & S. R. R. Co., 105 Cal. 184, 188, 38 Pac. Rep. 632.

As to the date of completion: Coss v. MacDonough, 111 Cal. 662, 666, 44 Pac. Rep. 325; Ward v. Crane, 118 Cal. 676, 678.

As to the character of the work, and as to the remodeling of an old house being the erection of a building: Ward v. Crane, supra.

As to failure of the contractor to complete the building within time agreed, due to the negligence of the defendant: White v. Fresno Nat. Bank, 98 Cal. 166, 167, 32 Pac. Rep. 979.

That the money due had been paid: Simons v. Webster, 108 Cal. 16, 18, 40 Pac. Rep. 1056; Barry v. Coughlin, 90 Cal. 220, 221, 27 Pac. Rep. 197.

But where the findings of the lower court are inconsistent, or are contrary to or not supported by the evidence, they will

Finding of agency supported by prima facie evidence: Donohoe v. Trinity Consol. G. M. Co., 113 Cal. 119, 124, 45 Pac. Rep. 259.

Finding as to losses: Pacific R. M. Co. v. English, 118 Cal. 123, 130, 50 Pac. Rep. 383.

Finding as to alteration of contract: Anderson v. Johnston, 120 Cal. 657, 660, 53 Pac. Rep. 264.

Finding that work of trifling character was done after date of completion: Coss v. MacDonough, 111 Cal. 662, 44 Pac. Rep. 325. See Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

Finding of value and amount of money in hands of owner: Adams v. Burbank, 103 Cal. 646, 649, 37 Pac. Rep. 640.

Finding as to extra work, although there was a finding for a balance for a small item of fifty cents, it being de minimis: Clark v. Collier, 100 Cal. 256, 259, 34 Pac. Rep. 677.

Finding as to value of extra work: Gray v. Wells, 118 Cal. 11, 17, 50 Pac. Rep. 23. So as to fixtures: Bianchi v. Hughes, 124 Cal. 24, 56 Pac. Rep. 610.

Finding based on conflicting evidence will not be reviewed: Stevenson v. Woodward, 3 Cal. App. 754, 86 Pac. Rep. 990.

Conflicting evidence as to alarm-bell; judgment not disturbed on appeal: Georges v. Kessler, 131 Cal. 183, 186, 63 Pac. Rep. 466.

Finding as to contract not disturbed on appeal: See Sims v. Petaluma G. L. Co., 131 Cal. 656, 62 Pac. Rep. 300; reversed 131 Cal. 656, 63 Pac. Rep. 1011.

Reviewing upon appeal conflicting evidence; change in composition agreement after signing: Schroeder v. Pissis, 128 Cal. 209, 60 Pac. Rep. 758.

Findings not disturbed as to terms of composition agreement and time of payment, evidence conflicting: Schroeder v. Pissis, 128 Cal. 209, 212, 60 Pac. Rep. 758.

Colorado. Charles v. Hallack L. & Mfg. Co., 22 Colo. 283, 43 Pac. Rep. 548.

Referee's findings not disturbed, no evidence being before the court on appeal: See Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. Rep. 350, s. c. 86 Pac. Rep. 1045 (Sup.).

Idaho. Conflict in oral evidence; findings not disturbed at law or in equity: Robertson v. Moore, 10 Idaho 115, 77 Pac. Rep. 218, 222.

Findings in equity case not disturbed, unless clearly erroneous, or against the weight of evidence: Idaho M. & M. Co. v. Davis, 123 Fed. Rep. 396, 59 C. C. A. 200.

Finding on immaterial fact, by stipulation, not to be attacked on the ground of the insufficiency of evidence to support same: Kent v. Richardson, 8 Idaho 750, 71 Pac. Rep. 117.

Substantial conflict in evidence; findings not disturbed: See Spaulding v. Cœur d'Alene R. & N. Co., 5 Idaho 528, 51 Pac. Rep. 408.

Montana. Findings based on conflicting evidence not disturbed: See A. M. Holter H. Co. v. Ontario M. Co., 24 Mont. 184, 61 Pac. Rep. 3, 8.

New Mexico. Ford v. Springer L. Assoc., 8 N. M. 37, 41 Pac. Rep. 541; Newcomb v. White, 5 N. M. 435, 23 Pac. Rep. 671 (exceptions only to particular items, or classes of items, in master's report will be considered on appeal).

Oklahoma. Darlington L. Co. v. Lobitz, 4 Okl. 355, 46 Pac. Rep. 481.

Findings not disturbed, where evidence reasonably supports same: Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184, 186.

be set aside upon appeal.[44] If the court finds the fact contrary to the admissions of the pleadings, the finding must be disregarded.[45]

Oregon. Justice v. Elwert, 28 Oreg. 460, 43 Pac. Rep. 649.

Utah. Dwyer v. Salt Lake City M. Co., 14 Utah 339, 47 Pac. Rep. 311.

Washington. McHugh v. Slack, 11 Wash. 370, 377, 39 Pac. Rep. 674.

Verdict not set aside as being against evidence: See Brown's Exrs. v. Farnandis, 27 Wash. 232, 67 Pac. Rep. 574.

[44] Thus where it appears from the testimony that the building was in fact completed more than ten days before the date of the certificate of the architect, a finding that the building was completed upon the date of the certificate of the architect will be set aside as not supported by the evidence: Washburn v. Kahler, 97 Cal. 58, 61, 31 Pac. Rep. 741 (finding as to performance); Perry v. Quackenbush, 105 Cal. 299, 305, 38 Pac. Rep. 740; Joost v. Sullivan, 111 Cal. 286, 292, 43 Pac. Rep. 896.

Upon foreclosure of material-man's lien, where the only evidence that the goods were sold for the purpose of being used in the structure is that of the salesman, that he did not know where the goods were to be used, but that they were the kind that were used for a telegraph and telephone line, a finding that the materials sold were "to be used in the construction of said telephone line" is not supported by the evidence: Roebling Sons Co. v. Bear Valley Irr. Co., 99 Cal. 488, 489, 34 Pac. Rep. 80.

Where the court finds, in terms, that person was an original contractor, and the findings disclose that this was but a conclusion drawn from an erroneous construction of the contract, the conclusion must be held unsupported by the evidence: John A. Roebling's Sons Co. v. Humboldt E. L. & P. Co., 112 Cal. 288, 292, 44 Pac. Rep. 568.

Finding that claim of lien filed by material-man was "in due form as required by law" is not sustained by the evidence, where the claim stated that the materials were to be paid for on the basis of what they were reasonably worth, and the evidence shows an express agreement as to price for some of them, although there is testimony as to the reasonable value; nor does such evidence sustain a finding of an agreement to pay for them all at what they were reasonably worth; and an allegation, in the complaint of foreclosure, that the claimant sold and delivered to the owner of the building "certain hardware and building material to be used in the erection and construction of said building, and affixed and attached thereto," is, in the absence of a special demurrer, a sufficient allegation that the materials were to be used in the building, to support a finding to that effect: Reed v. Norton, 90 Cal. 590, 593, 598, 26 Pac. Rep. 767, 27 Id. 426 (valid contract).

Utah. Disturbance of findings on appeal in equity case, when inconsistent: See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360, 365.

Washington. Washington R. P. Co. v. Johnson, 10 Wash. 445, 39 Pac. Rep. 115. And in an equity case, unless there has been a request for findings, or an objection raised on that account, in the court below, before the entry of the decree, the objection will not be considered on appeal: Id.

[45] Bradbury v. Cronise, 46 Cal. 287, 289 (that labor was performed on a mining claim). See Petersen v. Shain, 33 Pac. Rep. 1086 (find-

§ 981. Same. On appeal from order denying motion for new trial. Where there is no appeal from the judgment, the court cannot consider any question as to the sufficiency of the findings to support the judgment on an appeal from an order denying a motion for a new trial.[46]

§ 982. Same. Who cannot attack findings. General creditors. General creditors, who have not established their liens, upon appeal from a money judgment rendered in their favor against the contractor, cannot attack the findings as to the liens of other claimants; and error in the judgment, in favor of such general creditors, cannot be complained of by them.[47]

§ 983. Harmless error. Where the error is harmless, the judgment will not be reversed therefor.[48] Thus —

ing not contrary to admission of facts as to payment to subcontractor — copartners).

Admission of ownership, in the separate answer of certain defendants, in an action to foreclose a mechanic's lien, must be taken as true upon appeal, notwithstanding a finding that other defendants were owners, upon issue joined as to their ownership: Goss v. Helbing, 77 Cal. 190, 19 Pac. Rep. 277.

Finding that building constructed upon leased ground by tenants was constructed with the knowledge and consent of the landlord will not be set aside upon appeal because the evidence does not show his consent, where the finding that it was done with his knowledge is in accordance with the admissions of the pleadings: West Coast L. Co. v. Apfield, 86 Cal. 335, 342, 24 Pac. Rep. 993.

Where the answer did not deny that no memorandum of contract was filed, and the court so finds, the supreme court will not consider whether the attempted filing of the original contract is sufficient as a memorandum: San Francisco L. Co. v. O'Neil, 120 Cal. 455, 457, 52 Pac. Rep. 728.

[46] Howe v. Schmidt (Cal. Sup., June 22, 1907), 90 Pac. Rep. 1056.

[47] Kennedy-Shaw L. Co. v. Priet, 113 Cal. 291, 293, 45 Pac. Rep. 336. See "General Creditors," §§ 601 et seq., ante.

[48] **Refusal of court to allow evidence as to circumstances surrounding making of contract,** where such evidence is subsequently given, and where such evidence is immaterial: Bryson v. McCone, 121 Cal. 153, 53 Pac. Rep. 637.

Where the statutory original contract reserved slightly less than twenty-five per cent of the contract price thirty-five days after the completion, no one being injured: Stimson M. Co. v. Riley (Cal., Dec. 20, 1895), 42 Pac. Rep. 1072.

Overruling of demurrer on ground of uncertainty as to character and extent of extra work, where nothing is allowed or awarded in the decree on account of the extra work: Wood v. Oakland & B. R. T. Co., 107 Cal. 500, 503, 40 Pac. Rep. 806.

Objecting to form of judgment against contractor not appealing. Where a judgment is given, enforcing a lien, and the contractor does not appeal, other defendants cannot urge the insufficiency in the form of the judgment against him, where the appellants are not injured thereby.[49]

Owner objecting to non-joinder of contractor. Where the owner of property appeals, he cannot complain for the first time that the contractor is not joined as a co-defendant. If he desires the contractor joined, he should make application to the trial court for an order therefor; and, in the absence of such application, he will not be heard upon appeal.[50]

Colorado. St. Kevin M. Co. v. Isaacs, 18 Colo. 400, 32 Pac. Rep. 822; Charles v. Hallack L. & M. Co., 22 Colo. 283, 43 Pac. Rep. 548.

Idaho. Non-prejudicial error; failure to find specifications were part of contract not sued upon: See Spaulding v. Cœur d'Alene R. & N. Co., 5 Idaho 528, 51 Pac. Rep. 408.

Montana. Extent and validity of lien not considered on appeal, no lien having been proved: McGlauflin v. Wormser, 28 Mont. 177, 72 Pac. Rep. 428.

Both parties attacking estimate of superintendent, one cannot complain of evidence admitted as to its inaccuracy: Cook v. Gallatin R. Co., 28 Mont. 340, 72 Pac. Rep. 678.

Oregon. Error appearing, not presumed to be harmless: Aldrich v. Columbia S. R. Co., 39 Oreg. 263, 64 Pac. Rep. 455, 460.

Utah. Non-prejudicial error; value of services: See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360, 365.

Washington. Van Hook v. Burns, 1 Wash. 22, 38 Pac. Rep. 763.

Where there is no exception to the finding of the sufficiency of the claim, the objection to the evidence will not be considered on appeal: Washington B. L. & Mfg. Co. v. Adler, 12 Wash. 24, 40 Pac. Rep. 383; McPherson v. Smith, 14 Wash. 226, 44 Pac. Rep. 255.

As to report of referee: See Fairhaven L. Co. v. Jordan, 5 Wash. 729, 32 Pac. Rep. 729.

Harmless error as to work not done on property: See Powell v. Nolan, 27 Wash. 318, 67 Pac. Rep. 712.

Delivery-slips admitted as books of original entry, exclusion of day-books not prejudicial: See Knudson-Jacob Co. v. Brandt (Wash., Sept. 25, 1906), 87 Pac. Rep. 43.

Lien not enforceable; immaterial exclusion of evidence: See Knudson-Jacob Co. v. Brandt (Wash., Sept. 25, 1906), 87 Pac. Rep. 43.

[49] Western L. Co. v. Phillips, 94 Cal. 54, 56, 29 Pac. Rep. 328.

[50] Yancy v. Morton, 94 Cal. 558, 560, 29 Pac. Rep. 1111.

As to possible error in admitting expert testimony: Pacific R. M. Co. v. English, 118 Cal. 123, 130, 50 Pac. Rep. 383.

Refusal of court, at trial, to permit amendment to answer setting up the existence of an entire system, of which the completed divisions of a canal formed a part, as presenting a new issue, upon which no evidence had been offered, is harmless, where the court subsequently allowed evidence upon that issue, which was considered in that court and upon appeal: Pacific R. M. Co. v. Bear Valley Irr. Co., 120 Cal. 94, 101, 52 Pac. Rep. 136, 65 Am. St. Rep. 158.

§ 984. **Same. Sufficiency of claim of lien.** Where the record contains the claims of lien, with the names attached, and shows that it was duly sworn to, and the certificate of the recorder's recordation is indorsed thereon, the court, on appeal, is bound by the recitals as to the filing, record, and verification of a claim of lien.[51]

§ 985. **Objecting on appeal for first time.[52] Contract not entirely filed.** Where no demurrer is offered to a complaint to foreclose a lien, on the ground that the contract set out therein is incomplete because the plans and specifications therein referred to are not attached and made a part thereof, and therefore the entire contract was not filed in the recorder's office, and the answer admits the contract as alleged in the complaint, and the contract is introduced in evidence without objection, it is too late to raise the question for the first time on appeal.[53]

[51] Silvester v. Coe Q. M. Co., 80 Cal. 510, 512, 22 Pac. Rep. 217.

[52] **Colorado.** Not to be raised for first time on appeal. Improper joinder of causes of action by amendment as to materials furnished by a third person: See Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107.

Defects in complaint, when it otherwise states a cause of action: Miller v. Thorpe, 4 Colo. App. 559, 36 Pac. Rep. 891.

Constitutionality of provision of statute as to sale and removal of improvements, when cannot be raised on appeal: See Joralmon v. McPhee, 31 Colo. 26, 71 Pac. Rep. 419.

Oregon. Absolute insufficiency of complaint may be raised for first time on appeal: See Horn v. United States M. Co., 47 Oreg. 124, 81 Pac. Rep. 1009.

Utah. Want of good faith as to claim of lien not considered on appeal for first time: See Sandberg v. Victor G. & S. M. Co., 24 Utah 1, 66 Pac. Rep. 360, 366.

Objecting to jurisdiction of court for first time on appeal, as to venue: See Fields v. Daisy G. M. Co., 26 Utah 373, 73 Pac. Rep. 521, s. c. 25 Utah 76, 69 Pac. Rep. 528.

[53] White v. Fresno Nat. Bank, 98 Cal. 166, 168, 32 Pac. Rep. 979.

Objection to complaint foreclosing a subclaimant's lien on ground that it states merely conclusions of law as to the amount due and owing from the owner to the contractors, and that it contains no specific averment as to what was the contract price between them, or that there was any express agreement to pay anything, or what was the reasonable value of the work to be done, can only be raised by demurrer, and cannot be urged for the first time on appeal: Russ L. Co. v. Garrettson, 87 Cal. 589, 592, 25 Pac. Rep. 747.

Case decided upon motion for nonsuit, findings of court, filed at the time that the motion for a nonsuit was granted, cannot be considered upon appeal: Snell v. Payne, 115 Cal. 218, 220, 46 Pac. Rep. 1069.

§ 986. **Same. Description of land.** Where there is no demurrer to the complaint as to the statement in the claim of lien regarding the description of the land to be charged with the lien, and there was no objection made to the claim when offered in evidence, the court will not consider technical objections, raised upon appeal for the first time, where, as a matter of fact, the claim contained a description of the property, and the complaint so alleged the fact; nor, under such circumstances, will the court consider for the first time upon appeal that such complaint did not aver that the claim of lien did not contain a "description of the property sufficient for identification." [54]

§ 987. **Same. Uncertainty of interest in property.** In the absence of a special demurrer, the objection that the complaint does not sufficiently indicate the nature and extent of the interest of a defendant in the land upon which a lien is sought to be foreclosed cannot be raised upon appeal for the first time, when such complaint avers that one of the defendants is the owner and reputed owner of the land upon which a well was constructed, and that the other defendant is the owner of such well and its appurtenances, and is the owner and holder of an interest in the land, and the complaint was dismissed as to the owner of such land, and such complaint sufficiently supports a judgment foreclosing the interest of the owner of the well in the land and such well.[55]

See Holland v. Wilson, 76 Cal. 434, 18 Pac. Rep. 412; Yancy v. Morton, 94 Cal. 558, 29 Pac. Rep. 1111; Rebman v. San Gabriel V. L. & W. Co., 95 Cal. 390, 394, 30 Pac. Rep. 564.

[54] Coss v. MacDonough, 111 Cal. 662, 666, 44 Pac. Rep. 325.

As to nature and extent of interest in land, see Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 495, 82 Pac. Rep. 51.

New Mexico. See Ford v. Springer Land Assoc., 8 N. M. 37, 41 Pac. Rep. 541.

Washington. Objection to description on appeal for first time not available, under Ballinger's Ann. Codes and Stats., § 5904: Olson v. Snake River V. R. Co., 22 Wash. 139, 60 Pac. Rep. 156.

[55] Parke & L. Co. v. Inter Nos O. & D. Co., 147 Cal. 490, 495, 82 Pac. Rep. 51 (question whether or not it would have been sufficient on special demurrer was not decided).

Omission to request amendment to pleading after demurrer sustained; objection for first time on appeal: See Durrell v. Dooner, 119 Cal. 411, 51 Pac. Rep. 628.

§ 988. **Consolidated cases. Hearing on appeal.** The court, upon appeal, will not consider the record in another case from the mere fact that the cases were consolidated, by order of the court below, upon consent of counsel for the respective parties, where the plaintiff in each case was defeated in the court below, and each one moved separately for a new trial, the grounds of which were peculiar to the respective cases, and separate bills of exceptions were prepared and filed, and separate appeals taken, and each case is presented on the appeal on its own record.[56]

§ 989. **Order on appeal. New trial.** In an action in personam against the owner, by the contractor, for the value of extra work, and for damages by reason of the refusal of the owner to permit the contractor to complete the contract, where the judgment of the lower court is greater than that justified by the undisputed evidence regarding such extra work, the court, on appeal, will not order a new trial for that reason, but will modify the judgment to the amount shown by such undisputed evidence.[57]

§ 990. **Same. New trial. When sustained.** If the supreme court can discover any ground upon which an order

[56] Harmon v. San Francisco & S. R. R. Co., 86 Cal. 617, 618, 25 Pac. Rep. 124.

[57] McConnell v. Corona City W. Co., 149 Cal. 60, 64, 85 Pac. Rep. 929, 8 L. R. A., N. S., 1171.

Modification of judgment enforcing lien, and ordering entry of personal judgment on appeal: See Schindler v. Green (Cal. App., Nov. 16, 1905), 82 Pac. Rep. 631, on rehearing in supreme court, 149 Cal. 752, 82 Pac. Rep. 341.

Judgment for proper amount not reversed for excessive claim made without fraud: See Continental B. & L. Assoc. v. Hutton, 144 Cal. 609, 611, 78 Pac. Rep. 21.

Colorado. Decree corrected, upon appeal, to a smaller amount: See Joralmon v. McPhee, 31 Colo. 26, 38, 71 Pac. Rep. 419.

Oregon. Case remanded to amend answer and trial upon merits: See Smith v. Wilkins, 31 Oreg. 421, 51 Pac. Rep. 438.

Utah. Admitted mistake in decree; allowing expense of filing claim not averred in complaint; decree modified: See Garner v. Van Patten, 20 Utah 342, 58 Pac. Rep. 684.

Washington. Amendment to cross-complaint considered as made on appeal: See Irby v. Phillips, 40 Wash. 618, 82 Pac. Rep. 931.

Wyoming. Appellate court rendering judgment without remand: See Big Horn L. Co. v. Davis, 14 Wyo. 455, 85 Pac. Rep. 1048, 84 Id. 900.

of the trial court granting a new trial could have been reasonably based, the action should be affirmed.[58] Thus —

Conflict of evidence. Street-work. Where, upon a conflict of evidence as to the substantial performance of a contract for street-work in front of a lot upon which a lien was sought to be enforced, the trial court grants a motion for new trial, the court, on appeal, will assume that, after a reconsideration of the facts on the motion for new trial, the court reached the opposite conclusion as to where the preponderance lay, and the supreme court, on appeal, will not interfere.[59]

§ 991. **Same. Attorneys' fees.** The subject of attorneys' fees on appeal has been already considered.[60] The court, on appeal from a judgment foreclosing twelve separate laborers' liens, cannot, in the absence of any evidence as to the amount of services, disturb an allowance of seventy-five dollars for attorneys' fees in the case of each of the liens.[61]

[58] De Haven v. McAuley, 138 Cal. 573, 574, 72 Pac. Rep. 152.

[59] De Haven v. McAuley, 138 Cal. 573, 574, 72 Pac. Rep. 152.

[60] See §§ 940 et seq., ante.

[61] Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74. See Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 234, 39 Pac. Rep. 758.

Bill of exceptions, showing amount in value of services performed by an attorney in the court below, necessary, in order to review an alleged excessive judgment for attorneys' fees: See concurring opinion of Shaw, J., in Castagnetto v. Coppertown M. & S. Co., 146 Cal. 329, 334, 80 Pac. Rep. 74.

Attorneys' fees allowed without allegation or finding, and not reviewable upon appeal: Ah Louis v. Harwood, 140 Cal. 500, 507, 74 Pac. Rep. 41.

Review by supreme court of abuse of discretion in allowing attorneys' fees: See Hampton v. Christensen, 148 Cal. 729, 84 Pac. Rep. 200, 204, s. c. 148 Cal. 729.

New Mexico. Amount of attorneys' fees allowed not disturbed, except for plain abuse of discretion: Armijo v. Mountain E. Co., 11 N. M. 235, 67 Pac. Rep. 726.

Washington. Additional allowance for attorneys' fees on appeal not made: Sweatt v. Hunt, 42 Wash. 96, 84 Pac. Rep. 1 (attorney's fee in lower court, $150; judgment, $1,172); Lavanway v. Cannon, 38 Wash. 593, 79 Pac. Rep. 1117.

See §§ 940 et seq., ante.

Allowance of attorneys' fees not disturbed upon appeal: Windham v. Independent T. Co., 35 Wash. 166, 76 Pac. Rep. 936.

PART III.

FORMS.

CHAPTER XLVI.

CONTRACTS, NOTICES, CLAIMS, COMPLAINTS, ETC.

Form No. 1. Statutory original contract. Skeleton form.
Form No. 2. Building contract. Clause for working-drawings.
Form No. 3. Building contract. Clause for delays.
Form No. 4. Building contract. Clause for certificates of architect as to payments.
Form No. 5. Building contract. Clause for delay in payments by owner.
Form No. 6. Building contract. Clause for construction of drawings and specifications.
Form No. 7. Building contract. Clause for alterations in contract.
Form No. 8. Building contract. Clause for written changes in contract.
Form No. 9. Building contract. Clause for arbitration.
Form No. 10. Building contract. Clause for damages for delay by contractor.
Form No. 11. Building contract. Clause for liability in case of destruction of building before completion. Owner and contractor sharing loss.
Form No. 12. Building contract. Clause for liability in case of destruction of building before completion. Owner assuming loss.
Form No. 13. Building contract. Clause for inspection and approval of work.
Form No. 14. Building contract. Clause for completion of building by owner, upon default of contractor.
Form No. 15. Builder's non-statutory original contract. Short form. (Agreement to build a house according to a plan annexed, material to be furnished by owner.)
Form No. 16. Bond for performance of original contract.
Form No. 17. Notice of non-responsibility by owner. Structure.
Form No. 18. Notice of non-responsibility by owner. Mining claim.

Form No. 19. Statement of contractor. Made to architect or owner as to liens, to obtain payment.
Form No. 20. Notice to owner of furnishing materials or performing labor.
Form No. 21. Notice, by owner, of completion of building, or of cessation from labor.
Form No. 22. Verification to foregoing notice.
Form No. 23. Claim of lien. Original contractor. Structure.
Form No. 24. Verification to the foregoing.
Form No. 25. Claim of lien. (Owner's material-man or laborer.) Structure.
Form No. 26. Miner's claim of lien. General form.
Form No. 27. Claim of lien. Subclaimant; subcontractor in the first degree; contractor's material-man or laborer. Structure.
Form No. 28. Claim of lien against two contiguous buildings owned by the same person. General form.
Form No. 29. Claim of lien for grading lot in incorporated city.
Form No. 30. Owner's notice to contractor to defend lien suits.
Form No. 31. Release of lien.
Form No. 32. Complaint for foreclosure of lien. Original contractor, under non-statutory original contract.
Form No. 33. Complaint for foreclosure of original contractor's lien, under statutory original contract.
Form No. 34. Complaint of lien-holder for grading or improving lot in incorporated city.
Form No. 35. Complaint for foreclosure of subclaimant's lien.
Form No. 36. Order of reference.
Form No. 37. Notice by contractor that he intends to dispute account.
Form No. 38. Findings and decision. Foreclosure of lien of owner's material-men, partners, on two houses, property sold during construction.
Form No. 39. Decree. Foreclosing lien of material-men, copartners, on two buildings, property sold during construction.
Form No. 40. Satisfaction of judgment.

Hints as to the use of the following forms.[1] The forms set forth in this work are intended merely as suggestions to the practitioner. In all cases, the statute, and the decisions

[1] **Miscellaneous forms.** Form, action by owner against contractor and lien claimants: See record, Stimson v. Dunham C. & H. Co., 146 Cal. 281, 79 Pac. Rep. 968.

Colorado. Appeal bond (under Mills's Ann. Stats., § 406): See Marean v. Stanley, 34 Colo. 91, 81 Pac. Rep. 759.

Form, appeal from decree of foreclosure: See Id.

thereunder, should be consulted and followed. The minute differences in the legislative enactments render it practically impossible to frame a set of flexible forms which will satisfactorily meet all requirements. With this note of warning, the writer hopes that none will be misled.

The California form may be used, in many instances, almost without change, in some jurisdictions. It sometimes happens, however, that the decisions of the particular state require more than the statute expressly prescribes; and, in a few cases, forms have been provided by legislative enactment.

Form No. 1. Statutory Original Contract. Skeleton form.[2]

[Kerr's Cyc. Code Civ. Proc., §§ 1183, 1184.]

Articles of Agreement,[3] Made this second day of January, nineteen hundred and eight, between G H, of the city and county of San Francisco, state of California, the party of the

Idaho. Form, answer, and counterclaim set out in action on bond: See American B. Co. v. Regents of University, 11 Idaho 163, 81 Pac. Rep. 604, 608.

Form, action on surety bond substantially set out in American B. Co. v. Regents of University, 11 Idaho 163, 81 Pac. Rep. 604.

Washington. Form, complaint on bond given by original contractor to owner: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

[2] Form, contract substantially complying with the law, the question as to the validity of the contract being in issue: See Hooper v. Fletcher, 145 Cal. 375, 377, 79 Pac. Rep. 418 (see record).

Text. See "Statutory Original Contract," §§ 269 et seq., ante (over $1,000).

Colorado. Statutory original contract over $500: 3 Mills's Ann. Stats., 2d ed., § 2867 (Laws 1899, pp. 261, 262, § 1).

[3] Form, various provisions of contract considered: See Gray v. La Société Française de B. M., 131 Cal. 566, 63 Pac. Rep. 848.

Form, clause in contract as to shrinkage: See Scanlan v. San Francisco & S. J. R. Co., 128 Cal. 586, 61 Pac. Rep. 271.

Text. See, generally, "Building Contracts," §§ 193 et seq., ante.

Colorado. Form, substance of contract to construct a ditch: See Flick v. Hahn's Peak & E. R. C. & P. Min. Co., 16 Colo. App. 485, 66 Pac. Rep. 453.

Idaho. Form of contract set out in American B. Co. v. Regents of University, 11 Idaho 163, 81 Pac. Rep. 604.

Montana. Form, substance of contract to construct railway tunnel, set out in Wortman v. Montana C. R. Co., 22 Mont. 266, 56 Pac. Rep. 316.

Washington. Summary of form of contract with county for the erection of a schoolhouse: See Long v. Pierce County, 22 Wash. 330, 61 Pac. Rep. 142.

first part, and A B, of the same place, the party of the second part, —

Witnesseth: The party of the first part will be hereinafter designated as the owner, and the party of the second part as the contractor, singular number only being used; and the word "architect," used herein in the singular, shall include the plural, and the masculine the feminine.

First. The contractor agrees, within the space of ninety working-days from and after date hereof, to furnish the necessary labor and materials, including tools, implements, and appliances, required, and perform and complete in a workmanlike manner all the mason, carpenter, plaster, plumbing, tinning, painting, sewer, roof, and tiling work for a two-story wooden frame building, and other works in connection therewith,[4] shown and described in, and by and in conformity with, the plans, drawings, and specifications for the same made by R S, the authorized architect employed by the owner,[5] and which are signed by the parties hereto, [at the end of said specifications, and on each sheet of said plans and drawings, which consist of five sheets,] which said plans, drawings, and specifications are hereto attached, and made a part hereof.[6]

Second. Said building is to be erected upon a lot of land situated in said city and county of San Francisco, state of California, and described as follows [insert description].[7]

Third. The owner agrees, in consideration of the performance of this agreement by the contractor, to pay, or cause to be paid, to the contractor, his legal representatives or assigns, the sum of twelve thousand dollars, in United States gold coin, at the times and in the manner following, to wit:[8] Payments to be made in instalments as the work progresses, on the first day of each month, commencing on

[4] **Text.** See "Labor for Which a Lien is Given," §§ 130 et seq., ante.

[5] **Text.** See "Architects," §§ 119 et seq., ante.

[6] Form, specifications for various parts of the building, referring to adjoining house as samples of the work, approved by court: See California I. C. Co. v. Bradbury, 138 Cal. 328, 331, 71 Pac. Rep. 346, 617.

Text. See "Plans and Specifications," §§ 208, 294 et seq., ante.

[7] **Text.** Compare "Description of Property," §§ 399 et seq., ante.

[8] **Colorado.** At least fifteen per cent twenty-five days after: 3 Mills's Ann. Stats., 2d ed., § 2868 (Laws 1899, pp. 263-265, § 2).

the first day of February, 1907, in sums equal to seventy-five per cent of the value of the work done and materials furnished under this contract, up to the date of said payment, to be estimated according to the whole contract price, and the balance of said contract price, viz., twenty-five per cent of said contract price, namely, the sum of three thousand dollars ($3,000), to be paid thirty-five days after final completion of the work described in this contract. The proportion in value of said work and materials furnished to the whole contract price to be estimated by the architect and contractor as aforesaid.

[Or, if the payments are to be made on the completion of specified portions of the work, insert: "Payments shall be made on the completion of specified portions of the work, as follows: First payment, two thousand dollars ($2,000) when the brickwork is up to the high grade, and the timbers laid; second payment, two thousand dollars ($2,000) when the brick walls are up to the second story, and the timbers laid; third payment, two thousand five hundred dollars ($2,500) when the brick walls are up to the third story, ready for the roof;[9] fourth payment, two thousand five hundred dollars ($2,500) when the roof is covered, floors laid, and all the plastering complete; fifth payment, three thousand dollars ($3,000) — twenty-five per cent of contract price[10] — payable thirty-five days after the final completion of the contract."[11]]

[Here insert clauses Forms Nos. 2 to 14, post, as may be desired.]

In witness whereof, The said parties to these presents have hereunto set their hands and seals, the day and year first above written. ——— [Seal]

Witness: ———. ——— [Seal]

[9] **Text.** Payments: See §§ 273 et seq., ante.

Utah. Payments not in advance of commencement of work: See Rev. Stats., § 1373. Contract price payable in money; exception: See Rev. Stats., § 1375.

Wyoming. See Rev. Stats., § 2893.

[10] Form, contract, payment on completion should be large enough to protect the owner: See Hampton v. Christensen, 148 Cal. 729, 739, 84 Pac. Rep. 200.

[11] **Text.** Final payment: See §§ 274 et seq., ante.

Form No. 2. Building Contract. Clause for working-drawings.

Said architect shall provide and furnish to the contractor all details and working-drawings necessary to properly delineate said plans and specifications; and the work is to be done and the materials furnished in accordance therewith, under the direction and supervision and subject to the approval of said architect,[12] or a superintendent selected and agreed upon by the parties hereto, within a fair and equitable construction of the true intent and meaning of said plans and specifications.[13]

Form No. 3. Building Contract. Clause for delays.[14]

The time during which the contractor is delayed in said work by the acts or neglects of the owner or his employees, or those under him by contract or otherwise, or by the acts of God which the contractor could not have reasonably foreseen and provided for, or by stormy and inclement weather which delays the work, or by any strikes, boycotts, or like obstructive action by employee or labor organizations, or by any general lockouts or other defensive action by employers, whether general or by organizations of employers, shall be added to the aforesaid time for completion.

Form No. 4. Building Contract. Clause for certificates of architect as to payments.[15]

Provided, That when each payment or instalment shall become due, and at the final completion of the work, certifi-

[12] **Text.** As to architect, see §§ 119 et seq., ante.

[13] **Washington.** Form, clause in contract as to performance of work to the satisfaction of owner: See Childs L. & Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373.

Form, clause in contract, contractor to provide facilities for inspection by owner, to remove condemned material, and to take down condemned work: See Childs L. & Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373.

[14] **Text.** See "Construction of Building Contracts," §§ 216 et seq., ante.

Washington. Form, provision in contract as to delay by reason of act of default of owner: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

[15] **Text.** See "Certificate." §§ 239 et seq., ante; "Payments," §§ 251 et seq., ante; "Architects," §§ 119 et seq., ante.

cates in writing shall be obtained from the said architect stating that the payment or instalment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates, under his hand, to the contractor, or, in lieu of such certificates, shall deliver to the contractor, in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied, to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates, or any of them, or, in lieu thereof, the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to be due by the contractor, and stated in the said demand made by him for the certificate, shall, at the expiration of said three days, become due and payable, and the owner shall be liable, and bound to pay the same on demand.

In case the architect delivers the writing aforesaid in lieu of the certificate, then a compliance by the contractor with the requirements of said writing shall entitle the contractor to the certificate.

Form No. 5. Building Contract. Clause for delay in payments by owner.[16]

For any delay on the part of the owner in making any of the payments or instalments provided for in this contract after they shall become due and payable, he shall be liable to the contractor for any and all damages which the latter may suffer; and such delay shall, in addition, operate as an additional extension of the time for completion aforesaid for the length of time of such delay. And such delay, if for more than five days after the date when said payments or instalments shall have respectively become due and payable,

Oregon. Form, contract, peculiar provisions in contract as to architect's certificate: See Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126, 129.

[16] **Text.** See "Original Contractor," § 61, ante; "Owner," §§ 512 et seq., ante; "Performance," §§ 334 et seq., ante.

as in this agreement provided, shall, at the option of the contractor, be held to be prevention by the owner of performance of this contract by the contractor.[17]

Form No. 6. Building Contract. Clause for construction of drawings and specifications.

The specifications and drawings are intended to co-operate, so that any work exhibited in the drawings and not mentioned in the specifications, or vice versa, are to be executed, the same as if both mentioned in the specifications and set forth in the drawings, to the true intent and meaning of the said drawings and specifications when taken together. But no part of said specifications that is in conflict with any portion of this agreement, or that is not actually descriptive of the work to be done thereunder, or of the manner in which the said work is to be executed, shall be considered as any part of this agreement, but shall be utterly null and void.[18]

Form No. 7. Building Contract. Clause for alterations in contract.[19]

Should the owner or the architect, at any time during the progress of the work, request any alterations or deviations in, additions to, or omissions from this contract, or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way affect or make void this con-

[17] **Text.** See "Performance," §§ 334 et seq., ante.

[18] **Text.** See "Construction of Building Contracts," §§ 216 et seq., ante.

[19] Form, provision as to changes in contract: See People's L. Co. v. Gillard, 136 Cal. 55, 60, 68 Pac. Rep. 578.

Text. See "Alteration of Original Contract," §§ 326 et seq., ante.

Washington. Form, provision in contract as to alterations: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

Form, provision in contract for alterations, etc., at a fair and reasonable valuation: See Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784.

Form, contract, provision as to alterations and deviations from and additions to contract: See Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794, 795.

tract; but the amount thereof shall be added to or deducted from the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature or extent thereof.[20]

Form No. 8. Building Contract. Clause for written changes in contract.[21]

The rule of practice to be observed in the fulfilment of the last foregoing paragraph shall be, that, upon the demand of either the contractor, owner, or architect, the character and the valuation of any or all changes, omissions, or extra work, shall be agreed upon and fixed in writing, signed by the owner or architect and the contractor, prior to execution.[22]

Form No. 9. Building Contract. Clause for arbitration.[23]

Should any dispute arise between the owner and the contractor, or between the contractor and the architect, respecting the true construction of the drawings or specifications, the same shall, in the first instance, be decided by the architect; but should either of the parties hereto be dissatisfied with the justice of such decision, or should any dispute arise between the parties hereto respecting the valuation of the extra work, work done, or work omitted, the disputed matter shall be referred to and decided by two competent persons, who are experts in the business of building, one to be selected by the owner or the architect, and the other by the

[20] **Text.** See "Performance," §§ 334 et seq., ante.

[21] **Text.** See "Alteration of Original Contract," §§ 326 et seq., ante.

Washington. Form, clause in contract as to alterations in contract upon written order of owner; arbitration as to value: See Childs L. & Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373.

[22] **Washington.** Form, contract, provision as to extra work required to be evidenced by certificate of owner, countersigned by architect: See Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794, 796.

Text. See "Extra Work," §§ 243 et seq., ante.

[23] **Text.** See "Arbitration Clause," §§ 230 et seq., ante.

contractor; and in case they cannot agree, these two shall select an umpire, and the decision of any two of them shall be binding on all parties.[24]

Form No. 10. Building Contract. Clause for damages for delay by contractor.[25]

Should the contractor fail to complete this contract, and the works provided for therein, within the time fixed for such completion, due allowance being made for the contingencies provided for herein, he shall become liable to the owner for all loss and damages which the latter may suffer on account thereof, but not to exceed the sum of fifty dollars per day for each day said works shall remain uncompleted beyond such time for completion.[26]

Form No. 11. Building Contract. Clause for liability in case of destruction of building before completion. Owner and contractor sharing loss.[27]

In case said work herein provided for should, before completion, be wholly destroyed by fire, defective soil, earthquake, or other act of God, which the contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid instalments thereon, or that may be

[24] **Washington.** Form, contract, provision as to dispute arising as to the true construction, same shall be decided by architect: See Friend v. Raltson, 35 Wash. 422, 77 Pac. Rep. 794, 795.

Form, provision as to alterations; clause relating to reference to arbitrators in case of dispute as to value of alterations, construed: See Brown's Exrs. v. Farnandis, 27 Wash. 232, 67 Pac. Rep. 574.

Form, provision in contract for extra work, requiring certificate from owner to be countersigned by architect: See Crowley v. United States F. & G. Co., 29 Wash. 268, 69 Pac. Rep. 784. (This provision of the contract for the benefit of the owner; intended as a rule of evidence, which may be waived: Id.)

[25] **Oregon.** Form, contract, provision as to delay: See Vanderhoof v. Shell, 42 Oreg. 578, 72 Pac. Rep. 126, 130.

Washington. Form, provision in contract for damages to be fixed and determined by architect or arbitration: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

[26] **Text.** See "Rights of Owner," § 510, **ante.**

[27] **Text.** See § 530, ante.

due under the fifth clause of this contract; and the loss occasioned thereby, and to be sustained by the contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract.

In the event of a partial destruction of said work by any of the causes above named, then the loss to be sustained by the owner shall be in the proportion that the amounts of instalments paid or due bear to the total amount of work done and materials furnished, estimated according to said contract price, and the balance of said loss to be sustained by the contractor.

Form No. 12. Building Contract. Clause for liability in case of destruction of building before completion. Owner assuming loss.[28]

In case said work herein provided for should, before completion, be wholly or partially destroyed by fire, defective soil, earthquake, or other act of God, which the contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner, and the owner to agree to carry an insurance for the full amount of the labor and material as the work progresses.

Form No. 13. Building Contract. Clause for inspection and approval of work.[29]

The payment of the progress payments by the owner shall not be construed as an absolute acceptance of the work done up to the time of such payments; but the entire work is to be subject to inspection and approval of the architect or superintendent at the time when it shall be claimed by the contractor that the contract and works are completed; but the architect or superintendent shall exercise all reasonable diligence in the discovery, and report to the contractor as the work progresses, of materials and labor which are not

[28] **Text.** See § 530, ante.
[29] **Text.** See, generally, §§ 229 et seq., ante.

satisfactory to the architect or superintendent, so as to avoid unnecessary trouble and cost to the contractor in making good defective parts.

Form No. 14. Building Contract. Clause for completion of building by owner, upon default of contractor.[30]

Should the contractor, at any time during the progress of the work, refuse or neglect, without the fault of the owner, architect, or superintendent, to supply a sufficiency of materials or workmen to complete the contract within the time limited herein, due allowance being made for the contingencies provided for herein, for a period of more than three days after having been notified by the owner, in writing, to furnish the same, the owner shall have power to furnish and provide said materials or workmen to finish the said work; and the reasonable expense thereof shall be deducted from the amount of the contract price.

Form No. 15. Builder's Non-Statutory Original Contract.[31] **Short form. (Agreement to build a house according to a plan annexed, material to be furnished by owner.)**

This Agreement, Made this —— day of ——, between A B, of ——, and C D, of ——,

Witnesseth: That the said C D, for the considerations hereinafter mentioned, does, for himself, his executors and administrators, covenant and agree with the said A B, his executors, administrators, and assigns, that he, the said C D, or his assigns, will, within the space of —— working-days next after the date hereof, in good and workmanlike manner, and according to the best of his skill and ability, upon the premises hereinafter described, erect, build, and finish, in a good and substantial manner, a two-story frame or wooden

[30] **Washington.** Form, clause in contract, three days' notice to supply proper materials and to terminate contract: See Childs L. & Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. Rep. 373.

Text. See "Right to Complete Construction," § 519, ante.

[31] Also adapted to all states not requiring contract to be accompanied by formalities.

Text. See "Non-Statutory Original Contract," §§ 258 et seq., ante. See Forms Nos. 1 to 14, and notes, ante.

building, according to the plans and specifications hereto annexed, and made a part hereof, of the dimensions following: ——; and to construct the same of such materials as the said A B, or his assigns, shall find and provide for the same; in consideration whereof the said A B does, for himself, his executors and administrators, covenant and agree well and truly to pay, or cause to be paid, unto the said C D, his executors, administrators, and assigns, the sum of —— dollars,[32] gold coin of the United States, in full for said work, when the same shall be completely finished; and also that he, the said A B, his executors, administrators, or assigns, shall, at his and their own proper expense, find and provide all the stone, brick, tile, timber, and other material necessary for making and building said house, in such quantities and at such times as the same may be required.

Owing to the impracticability and extreme difficulty of fixing the actual damages, there shall be a forfeiture of twenty dollars per day for each and every day over the stated time for the completion of said building, to be deducted from the contract price.

The following is a description of the real property whereon said building is to be erected: —— [insert description].

In witness whereof, Said parties have hereunto set their hands and seals the day and year first above written.

—— [L. S.]
—— [L. S.]

Signed, sealed, and delivered in the presence of ——.

—— [L. S.]

[Annex plans and specifications.]

Form No. 16. Bond for Performance of Original Contract.[33]

Know all men by these presents, That we, A B as principal, and C D and E F as sureties, all of the city and county of

[32] One thousand dollars or less: **Kerr's Cyc. Code Civ. Proc.**, § 1183. **Colorado.** Non-statutory original contract, $500 or under: 3 Mills's Ann. Stats., 2d ed., § 2867 (Laws 1899, pp. 261, 262, § 1).

[33] Form, common-law bond, contractor's bond making no reference to § 1203 of the Code of Civil Procedure, upheld, although section declared unconstitutional: See Alcatraz M. H. Assoc. v. United States F. & G. Co., 3 Cal. App. 338, 85 Pac. Rep. 156, 157.

San Francisco, are held and firmly bound unto G H, of the same place, in the sum of ten thousand dollars (or such other sum as may cover all possible damages), in gold coin of the United States, to be paid to the said G H, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this —— day of ——, one thousand eight hundred and ninety-nine.

The condition of the above obligation is such, That whereas the said A B did, at the date hereof, enter into a contract, in writing, with the said G H, by which said A B agreed to erect a certain dwelling-house for the said G H, and fully fulfil and perform all the covenants, agreements, and stipulations therein contained on the part of said A B to be so fulfilled and performed, a copy of which agreement is hereto annexed and made a part hereof, —

Form, bond, held valid, although statute is unconstitutional and void: See People's L. Co. v. Gillard, 136 Cal. 55, 58, 68 Pac. Rep. 576.

Common-law bond: See Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. Rep. 662.

Text. See "Bond," §§ 281 et seq., and §§ 605 et seq., ante.

Arizona. Form, condition of bond: See Prescott N. Bank v. Head (Ariz.), 90 Pac. Rep. 328.

Idaho. Form of bond accompanying contract set out in American B. Co. v. Regents of University, 11 Idaho 163, 81 Pac. Rep. 604, 607.

Oklahoma. See Rev. & Ann. Stats., (4829) § 631, (4830) § 632, (4831) § 633.

Oregon. Form, bond with original contractor's contract set out in Ausplund v. Ætna Ins. Co., 47 Oreg. 10, 81 Pac. Rep. 577. See McKinnon v. Higgins, 47 Oreg. 44, 81 Pac. Rep. 581.

Form, bond of contractor, set out in full, provisions construed: See Enterprise H. Co. v. Book, 48 Oreg. 58, 85 Pac. Rep. 334.

Form, bond, clause as to protection against mechanics' liens; payment for materials; certificate of county clerk and recorder that no lien filed: See Hand Mfg. Co. v. Marks, 36 Oreg. 523, 52 Pac. Rep. 512, 53 Id. 1072, 59 Id. 549.

Form, bond, clause as to preserving building free from liens: See Henry v. Hand, 36 Oreg. 492, 59 Pac. Rep. 330.

Washington. See Pierce's Code, § 6102, as amended Laws 1905, ch. cxvi.

Form, contractor's bond, provision as to time for commencing suit: See Friend v. Ralston, 35 Wash. 422, 77 Pac. Rep. 794, 795.

Form, bond, time within which action must be brought: See Beebe v. Redward, 35 Wash. 615, 77 Pac. Rep. 1052.

Form, bond, recitals and obligation: See Drumheller v. American S. Co., 30 Wash. 530, 71 Pac. Rep. 25.

Now, therefore, if the above-bounden A B, his executors, administrators, or assigns, shall in all things stand to, abide by, and well and truly keep and perform the covenants, conditions, and agreements in the said contract contained, on his part to be kept and performed, at the time and in the manner and form therein specified, then the above obligation shall be void, else to remain in full force and virtue.

A B [L. S.]
C D [L. S.]
E F [L. S.]

Signed, sealed, and delivered in the present of ——.

[Attached to copy of contract.]

Form No. 17. Notice of Non-Responsibility by Owner. Structure.[34]

[Kerr's Cyc. Code Civ. Proc., § 1192.]

To All Whom It may Concern.

Notice is hereby given, That, whereas I, the undersigned, am the owner of [or if only an interest in the property is claimed or held, state, "have and claim an interest in"] the following described lot of land in the city and county of San Francisco, state of California [here describe land];

And that I have within the last three days obtained knowledge that the following construction [or "alteration" or "repair," as the case may be] has been commenced to be made thereon [or "has been made," as the case may be, or "that the following construction" (or "alteration" or "repair") is intended thereon] viz. [here describe it]; that the said construction [or "alteration" or "repair"] is being [or "about to be"] done without my consent, authority,

[34] **Alaska.** See Civ. Code, § 265.

Colorado. See 3 Mills's Ann. Stats., 2d ed., § 2871.

Nevada. See Cutting's Comp. Laws, § 3889.

New Mexico. See Comp. Laws, § 2226.

Oregon. See Bellinger and Cotton's Ann. Codes and Stats., §§ 5643, 5668, as amended Gen. Laws 1907, p. 293, §§ 1, 6.

Form, notice of non-responsibility (held sufficient, under § 5643, Bellinger and Cotton's Ann. Codes and Stats.), set out in Marshall v. Cardinell, 46 Oreg. 410, 80 Pac. Rep. 652.

Text. See "Notice of Non-Responsibility," §§ 473 et seq., ante.

license, or permission; and notice is hereby given that I will not be responsible for the same, or any part thereof, and that I will oppose any attempt to make the cost of the same, or any part thereof, a lien upon the land above described. A B

Dated at San Francisco this ——— day of ———, 1899.

Form No. 18. Notice of Non-Responsibility by Owner. Mining claim.[35]

The undersigned, owners [or, state interest] of the Good Luck Mines, with all their mills, chlorination-works, buildings, ditches, dams, pipe lines, giants, and other appurtenances, located in the Good Luck mining district, county of Eldorado, state of California, having leased said property to J K for a period of three years, commencing from and after the second day of January, 1908, hereby give notice that said undersigned will be in no way responsible for any debts contracted by said J K or of his agent, or any person in possession of said property, or working on, improving, or developing the same, for any work or labor performed or material supplied in the working, development, or improvement of said property, or in the construction, alteration, or repair of any structure thereon, within said period of said lease, nor will said property, nor the interest of the undersigned therein, be subject to a lien for any of such work or material. (Signed) R V

Dated December 26, 1907.

Form No. 19. Statement of Contractor. Made to architect or owner as to liens, to obtain payment.

I, A B, the party of the second part in the written agreement annexed [or, otherwise identify the agreement], having performed so much of said agreement as to entitle me to the first [or, "second" or "third," as the case may be] payment in said agreement, covenanted by the party of the first

[35] **Text.** See "Notice of Non-Responsibility," §§ 473 et seq., ante. See Form No. 17, notes, ante.

part to be paid to me, do hereby declare that I do not owe, nor am I liable to, any person or persons for any work or labor done or performed for me in the said work so far as it has progressed, nor for any materials furnished to me by any person or persons whatever, in carrying on the said work, so far as it has progressed, and that no debt incurred in the performance of said agreement by me can, at any time, under the laws of the state of California, be made a lien on the building or real property in said agreement described. This statement is made to enable me to obtain the said payment, which I claim to be now due under said agreement.

Dated this —— day of ——, 1899.

Form No. 20. Notice to Owner of Furnishing Materials or Performing Labor.[36]

[Kerr's Cyc. Code Civ. Proc., § 1184.]

To ——.

Notice is hereby given, That the undersigned has performed labor [or, "furnished materials," or both, or "has agreed to" do so, as the case may be] for ——, your contractor [or, "a person acting by your authority"], in the construction [or, "alteration" or "repair"] of that certain structure or improvement situate [here insert description of property].

The following is a statement, in general terms, of the kind of labor [or, "materials," inserting cost, dates, quantities, and qualities].

The amount in value of that already done [or, "furnished," or both], as near as may be, is —— dollars; and the amount in value of the whole agreed to be done [or, "furnished," or both] is —— dollars.

[36] **Text.** See "Notice to Owner," §§ 547 et seq., ante.
Arizona. See Rev. Stats. 1901, §§ 2890, 2899.
Colorado. The foregoing form substantially complies with 3 Mills's Ann. Stats., 2d ed., § 2868.
Hawaii. See Rev. Laws, § 2174.
Oklahoma. See Rev. & Ann. Stats., (4819) § 621.
Wyoming. See Rev. Stats., § 2876 (mines).

And you are hereby notified to withhold from said contractor [or, "person acting by your authority"] sufficient money to answer the foregoing claim, and any lien that may be filed therefor for record under chapter two, title four, part three, of the Code of Civil Procedure of California [or give title of statute], including counsel fees, besides costs, provided for in said chapter.

Dated this ——— day of ———, 1899. ———

Form No. 21. Notice, by Owner, of Completion of Building, or of Cessation from Labor.[37]

[Kerr's Cyc. Code Civ. Proc., § 1187.]

To Whom It may Concern.

Notice is hereby given by G H, the owner of the property hereinafter described:

That the building ["improvement," or "structure," or the "alteration," "addition to," or "repair thereof," as the case may be] situated on the premises hereinafter described, the contract for which was heretofore, to wit, on the second day of January, 1899, let to A B, and which contract was filed for record in the recorder's office of the city and county of San Francisco, state of California, on the second day of January, 1899, was actually completed on the tenth day of March, 1899, and accepted by me on said day.

[Or, in case of cessation from labor for thirty days, say, "That there has been a cessation from labor upon the contract heretofore, to wit, on the second day of January, 1899, entered into between me and A B, which contract was filed for record in the recorder's office of the city and county of San Francisco, state of California, and which said contract is unfinished, and upon the building ['improvement,' or 'structure,' or 'upon the alteration,' 'addition to,' or 'repair thereof,' as the case may be] to be erected ['altered,' 'added to,' or 'repaired'], under said contract, upon the premises hereinafter described for thirty days, and that the date on which such cessation actually occurred was the third day of February, 1899."]

[37] **Text.** See "Notice of Completion," §§ 425 et seq., ante.

That the name of the person who caused the said building ["improvement" or "structure"] to be erected [or, "said alteration," "addition to," or "repair to be made"] is G H.

That the nature of the title of said person is as follows: Said G H is and was the owner in fee-simple of said property.

That the following is a description of said property [insert description, at least sufficient for identification]. G H

Dated this eleventh day of March, 1899.

Form No. 22. Verification to Foregoing Notice.[38]

State of California,
City and County of San Francisco, } ss.

G H, being first duly sworn, deposes and says: That he is the owner [or, in case of verification by some other person, "that he is the book-keeper (or agent), and authorized to make and file the foregoing notice and to make this verification in behalf of the owner"] of the property described in the foregoing notice, and who is mentioned therein; that he has [heard] read said notice, and knows the contents thereof, and that the same is true of his own knowledge [in case of verification by agent, add reason for making verification]. G H

Subscribed and sworn to before me this eleventh day of March, 1899.

[Seal] ——, Notary Public.

Form No. 23. Claim of Lien. Original Contractor. Structure.[39]

A B
v.
G H

To Whom It may Concern.

Notice is hereby given: 1. That I, A B, of the city and county of San Francisco, state of California, have performed

[38] **Text.** See "Verification of Claim," § 410, ante.

[39] This form contains some statements not absolutely required by **Kerr's Cyc. Code Civ. Proc.**, § 1187; but to render the same more general, in view of decisions in other jurisdictions, it is given as above.

labor and furnished materials in the construction ["alteration," "addition to," or "repair," or show that the nature of the labor is within the statute] of that certain building, improvement, or structure [or, show that the object is

Text. See "Contents of Claim," §§ 370 et seq., ante.

Form, claim of lien held sufficient: See Weldon v. Superior Court, 138 Cal. 427, 428, 71 Pac. Rep. 502.

Alaska. Similar form can be used: Civ. Code, § 266.

Arizona. See Rev. Stats. 1901, § 2889 (contract or itemized account); Rev. Stats. 1901, § 2891 (description); Rev. Stats. 1901, § 2898 (attested account).

Colorado. Similar form: 3 Mills's Ann. Stats., 2d ed., § 2875.

Hawaii. See Rev. Laws, § 2174.

Idaho. Similar form: Sess. Laws 1899, p. 148, § 6.

Montana. A just and true account of the amount due (substantially the same as under the California statute) required; but "terms, time given, and conditions of contract" not required by statute. See Code Civ. Proc., § 2131, as amended Laws 1901, p. 162.

Nevada. Claim of lien same as in California, under amendment Stats. 1903, p. 51 (Cutting's Comp. Laws, § 3885). Amount must be over $5.

New Mexico. Similar form: Comp. Laws, § 2221.

Form, claim of lien; substance of claim set out; held to be sufficient (under Comp. Laws 1897): See Pearce v. Albright, 12 N. M. 202, 76 Pac. Rep. 286.

Oklahoma. Different form: See Rev. & Ann. Stats., (4818) § 620, (4819) § 621. Claim can be amended: See Rev. & Ann. Stats., (4821) § 623.

See form of "statement," Blanshard v. Schwartz, 7 Okl. 23, 54 Pac. Rep. 303.

Form, statement, claim of lien: See Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

Form, notice of filing claim served on owner, approved: See Ferguson v. Stephenson-Brown L. Co., 14 Okl. 148, 77 Pac. Rep. 184.

Oregon. As to mines, Bellinger and Cotton's Ann. Codes and Stats., § 5669, as amended Gen. Laws 1907, p. 295; and as to structures, Bellinger and Cotton's Ann. Codes and Stats., § 5644. California form applicable; but statement of "terms, time given, and conditions of the contract" not expressly required.

Utah. Claim should contain a notice of intention to claim and hold a lien. Mention of name of reputed owner not required. The time when the first and last labor was performed, or the first and last materials were furnished, should be stated: See Rev. Stats., § 1386, and also §§ 1388, 1399.

Washington. Statutory form of claim: See Pierce's Code, § 6106.

Form, claim of lien (verification and formal parts omitted) stated by court to be sustantially in the form set out and provided for by 2 Ballinger's Ann. Codes and Stats., § 5904, which superseded 1 Hill's Code, § 1667: See Seattle L. Co. v. Sweeney, 33 Wash. 691, 74 Pac. Rep. 1001.

Form, claim of lien, extra work; form stated in substance; held sufficient (under 2 Ballinger's Ann. Codes and Stats., § 5904): See Young v. Borzone, 26 Wash. 4, 66 Pac. Rep. 135, 140, 421.

Wyoming. See Rev. Stats., §§ 2871, 2872, 2879 (mines), and § 2893 (structures).

within the statute] now upon that certain lot or parcel of land situate in the city and county of San Francisco, state of California, and sought to be charged with the lien hereby claimed, and more particularly described as follows, to wit [insert description sufficient for identification].

2. That G H is the name of the owner [or, "reputed owner"] of said premises, and caused said building ["structure" or "improvement," or state object] to be constructed [or, "altered," "added to," or "repaired"; or state nature of labor].

3. That the name of the person by whom I was employed, and to whom I furnished said materials, is G H.

4. That on the second day of January, 1899, I entered into a contract with said G H for the construction ["alteration," "addition to," or "repair"] of said building ["improvement" or "structure"], and the following is a statement of the terms, time given, and conditions of said contract, to wit [here be careful to insert exactly all the terms, time of payment given, and conditions expressly agreed upon, and, if the contract is in writing, it is advisable to copy the exact language of the same].

5. That said contract has been fully performed on my part, and the same was completed, and the construction ["alteration," "addition to," or "repair"] of said building ["improvement" or "structure"] was completed on the tenth day of March, 1899, and sixty days [or, state statutory period] have not elapsed since the same were completed.

6. That the following is a statement of my demand, after deducting all just credits and offsets, to wit: —— [here insert the contract price, the amount paid thereon, and the balance due and unpaid, "after deducting all just credits and offsets." In those states where a "statement of account" is required, the details of debit and credit should be set forth. It is advisable in all cases to give the exact dates of the first and last items].

Wherefore, I claim a lien upon said property, and the benefit of the law relating to the liens of mechanics and others upon real property, to wit, chapter two, title four, part three, of the Code of Civil Procedure of the state of California [or insert title of statute]. A B

Form No. 24. Verification to the Foregoing.[40]

State of California,
City and County of San Francisco, } ss.

A B, being duly sworn, deposes and says: That he is the [" agent," etc. Compare verification to notice of completion by agent, Form No. 22] person named as claimant in the foregoing claim of lien; that he has [heard] read the same, and knows the contents thereof, and that the same is true of his own knowledge; and that the contents show (among other things) a correct statement of said claimant's demand, after deducting all just credits and offsets. A B

Subscribed and sworn to before me this twelfth day of March, 1899.

[Seal] ——, Notary Public.

Form No. 25. Claim of Lien. (Owner's material-man[41] **or laborer.) Structure.**

[See Form No. 23.]

L M
v.
G H

To Whom It may Concern.

Notice is hereby given. That I. L M. of the city and county of San Francisco. state of California. have furnished materials [or, " performed labor "], as hereinafter stated. in the construction [" alteration." " addition to," or " repair,"

[40] **Text.** See "Verification," § 410, ante.

Alaska. Similar form: See Civ. Code, § 266.

Colorado. Similar form: See 3 Mills's Ann. Stats., 2d ed., § 2875.

Idaho. Affidavit that claimant believes the same to be just: See Sess. Laws 1899, p. 148, § 6.

Nevada. Similar form: See Cutting's Comp. Laws, § 3885, as amended Stats. 1903, p. 51.

Oregon. Similar form: See Bellinger and Cotton's Ann. Codes and Stats., § 5644; and § 5669, as amended Gen. Laws 1907, p. 295.

See form, Curtis v. Sestanovich, 26 Oreg. 107, 37 Pac. Rep. 67.

Utah. Similar form: See Rev. Stats., §§ 1386, 1388, 1399.

Washington. Statutory form: See Pierce's Code, § 6106.

Wyoming. See Rev. Stats., §§ 2871, 2872, 2879, 2893.

[41] See notes to Forms 23, 24, ante.

Text. See "Contents of Claim," §§ 370 et seq., ante.

Form. material-man's claim of lien (two forms), set out and approved in Germania B. & L. Assoc. v. Wagner, 61 Cal. 349

or state nature of labor] of that certain building [" improvement " or " structure," or state object of labor] now upon that certain lot or parcel of land situate in said city and county of San Francisco, and sought to be charged with the lien hereby claimed, and more particularly described as follows, to wit: —— [insert description].

[Insert paragraph 2 of Form No. 23.]

That the name of the person to whom I furnished said materials [or, " by whom I was employed "] is G H.

That said materials were so furnished [or, " said labor was performed "] between the second day of January, 1899 [date of first item], and the first day of February, 1899 [date of last item. Be sure that the dates are correct]; and the same was, at the special instance and request of said G H, furnished for and actually used in said construction [" alteration," " addition to," or " repair "], and the following is a statement of the terms, time given, and conditions of my contract therefor with said G H, to wit:

I sold and delivered between the second day of January, 1899, and the first day of February, 1899, to said G H, certain material, to wit, twenty thousand feet one-by-four flooring, at the agreed price of twenty dollars per thousand feet, net, and said G H agreed to pay therefor upon the completion of said building [or, in the case of labor, " I was employed by said G H as a journeyman carpenter for twenty days in and about said building, at the agreed wages of five dollars per day, and said G H agreed to pay the same weekly." See Form No. 23].

That said contract has been fully performed on my part, and the same was completed, and the construction [" alteration," " addition to," or " repair "] of said building [" improvement " or " structure "] was completed on the tenth day of March, 1899, and notice thereof was on said day filed with the recorder of said city and county, by said owner, and thirty [or, the statutory period] days have not elapsed since said completion [and the filing of notice thereof].

That the following is a statement of my demand, after deducting all just credits and offsets:

The total agreed price of said lumber is four hundred dollars; said G H has paid me, on account thereof, the sum of one hundred dollars; and the balance — three hundred dollars — is still due and unpaid, after deducting all just credits and offsets [or, in the case of labor, " the total agreed value of my labor is one hundred dollars, and no part of the same has been paid, and the whole thereof is due and unpaid, over and above all just credits and offsets "].

Wherefore, I claim a lien for my said demand [as in Form No. 23]. L M

[Verification as in Form No. 24.]

Form No. 26. Miner's Claim of Lien. General form.[42]

L M)
v.
California Consolidated Mining Company (a Corporation).)

To Whom It may Concern.

Notice is hereby given, That I, L M, of Grass Valley, Nevada County, state of California, have performed labor as a miner, as hereinafter stated, in a certain mining claim, commonly known as and called the " Klondyke Claim," situate in the Chilkoot mining district, in said county, and sought to be charged with the lien herein claimed, and which is more particularly described as follows [here describe the mining claim, stating the number of feet of ground over which the claim extends, and which it includes, all of which will generally be found in the deed or claim recorded in the office of the recorder of the district or county].

[42] This form may be changed so as to be adapted to the claim of a contractor for repairing in a mining claim, or for erecting an aqueduct or flumes and sluices leading to or from a mining claim, or excavating a tunnel in or a ditch or canal leading to a mining claim, or similar work.

Form, claim of lien, mining claim: See Castagnetto v. Coppertown Min. & S. Co., 146 Cal. 339, 80 Pac. Rep. 74.

See Forms Nos. 23, 24, 25, and notes, ante.

Text. See "Contents of Claim," §§ 370 et seq., ante.

New Mexico. Form, miner's claim of lien, superintending mine, set forth: See Boyle v. Mountain Key M. Co., 9 N. M. 237, 50 Pac. Rep. 347 (the lien was held void, but only owing to the nature of the labor).

That the California Consolidated Mining Company (a corporation) is the name of the owner [or reputed owner] of said mining claim.

That J K is the name of the person by whom I was employed to perform the labor herein mentioned, and who, as superintendent, had charge of the mining in said claim, by authority of said owner.

That the following is a statement of the terms, time given, and conditions of the contract under which I performed said labor, to wit:

Said J K agreed to pay me five dollars per day, payable upon demand, as long as I worked for said corporation, as a miner in said claim [insert all provisions expressly agreed upon].

That, under said agreement, I labored as a miner in the tunnel on said claim [or otherwise show that it was labor in a mining claim] for ten days, to wit, from the fifth day of October, 1897 [the date of commencing said labor], to the fourteenth day of October, 1897 [the date of the ceasing of said labor], both inclusive.

That thirty days [or state statutory time] have not expired since the performance by me of said labor.

That the following is a statement of my demand, after deducting all just credits and offsets. The total amount of agreed wages was fifty dollars, and there has been paid to me, on account thereof, the sum of twenty-five dollars, and the balance thereof, to wit, twenty-five dollars, still remains due and unpaid, over and above all just credits and offsets, although I have demanded the same from said corporation, for which balance, to wit, twenty-five dollars, I hereby claim a lien upon said mining claim, together with the improvements and appurtenances [and the works owned and used by said corporation for reducing the ores from said mining claim], under and by virtue of chapter two, part three, title four, of the Code of Civil Procedure of the state of California [or insert title of statute].

L M

[Verification as in Form No. 24.]

Form No. 27. Claim of Lien. Subclaimant; subcontractor in the first degree; contractor's material-man or laborer.[43] Structure.

[See Form No. 23.]

N O
v.
A B and G H

To Whom It may Concern.

Notice is hereby given, That I, N O, of the city of Oakland, county of Alameda, state of California, have performed labor and furnished materials [or either, in the case of contractor's material-man or laborer, respectively] in the construction [see Form No. 23] of that certain building, improvement, or structure now upon that certain lot or parcel of land situate in the city and county of San Francisco, state of California, and sought to be charged with the lien hereby claimed, and more particularly described as follows, to wit: —— [insert description].

That G H is the name of the owner [or, "reputed owner"] of said premises, and caused said building to be constructed.

That A B is the name of the contractor, who, on the second day of January, 1899, as such contractor, employed by said owner, G H, and in charge of the construction of said building, entered into a contract [in writing] with me, under and by which I was to perform the labor on and furnish the materials for all the brickwork in said building [or, set out the contract, if for labor or materials; as in Forms Nos. 23 and 25], and the following is a statement of the terms, time given, and conditions of said contract, to wit: —— [insert the same. See Form No. 23].[44]

[43] Form, claim of lien, contractor's material-man: See Madary v. Smartt, 1 Cal. App. 498, 500, 82 Pac. Rep. 561. **Kerr's Cyc. Code Civ. Proc.**, § 1187, provides specifically "what matters and things are essential to be stated in a claim of lien, all of which appear in this lien."

See preceding forms, and notes to Forms 23, 24, ante.

Text. See "Contents of Claim," §§ 370 et seq., ante.

Colorado. Form, claim of lien for materials, contractor's material-man: See Sickman v. Wollett, 31 Colo. 58, 71 Pac. Rep. 1107 (held sufficient).

[44] This form may be adapted for subcontractors in the second and subsequent degrees, and subcontractors' laborers and material-men.

That said contract has been fully performed on my part, and the same was completed, and the construction of said building was completed, on the tenth day of March, 1899, and on said day said G H filed with the recorder of said county notice of completion thereof, and thirty days have not elapsed since the said completion and the said filing of notice thereof.

That the following is a statement of my demand, after deducting all just credits and offsets: ——. N O

[See preceding forms.]

[Conclude as in previous forms.]

[Verification as in Form No. 24.]

Form No. 28. Claim of Lien against Two Contiguous Buildings Owned by the Same Person.[45] General form.

[Kerr's Cyc. Code Civ. Proc., §§ 1187, 1188.]

[See Form No. 23.]

A B
v.
G H

To Whom It may Concern.

Notice is hereby given, That I, A B, of [state residence], have performed labor, etc. [see preceding forms], in the construction [or, state nature of labor] of those certain buildings [or, state object of labor] now upon those certain lots or parcels of land situate in the city and county of San Francisco, state of California, and sought to be charged with the lien hereby claimed, and more particularly described as follows, to wit: ——.

by changing the first part of this paragraph, in manner following, thus: "That A B is the name of the contractor, who, on the second day of January, 1899, as such contractor, in charge of the construction of said building, and employed by the owner, G H, therefor, entered into a contract with N O P, as subcontractor, to perform all the tinning to be performed in the construction of said building, and that said subcontractor, N O P, in charge of said tinning, entered into a contract with me, under and by which I was to perform the labor," etc. (following rest of paragraph).

[45] **Text.** See "Two or More Descriptions," §§ 406 et seq., and §§ 502 et seq., ante.

Idaho. See Sess. Laws 1899, p. 152, § 7.

Nevada. See Cutting's Comp. Laws, § 3886.

New Mexico. See Comp. Laws, § 2222.

Washington. See Pierce's Code, § 6109.

[Insert description of each piece separately.]

[Insert paragraphs 2, 3, 4, and 5, as in Form No. 23, mak ing the statements applicable to both buildings.]

That the following is a statement of my demand, after deducting all just credits and offsets, to wit: ——.

[Here insert statements showing the total amount on each object, the amounts paid on each, if any, and the balance due on each; for instance: "I performed labor as a hodman in carrying bricks and mortar to said contiguous buildings for a period of thirty days, as aforesaid, at the agreed rate of three dollars per day, making, for said work on said two buildings, the sum total of ninety dollars; that twenty days of said labor, of the agreed value of sixty dollars, was performed on the east building, situate on the lot first hereinabove described, that no part thereof has been paid to me, and that the amount due and unpaid to me thereon is said sum of sixty dollars, over and above all just credits and offsets; that ten days of said labor, of the agreed value of thirty dollars, was performed on the west building, situate on the lot secondly above described, that the sum of twenty dollars has been paid thereon to me, and that the amount due and unpaid to me thereon is the sum of ten dollars, over and above all just credits and offsets; and that the sum total due and unpaid to me on said two contiguous buildings is seventy dollars, over and above all just credits and offsets."]

Wherefore [conclude as in Form No. 23]. A B

[Verification as in Form No. 24.]

Form No. 29. Claim of Lien for Grading Lot in Incorporated City.[46]

[Kerr's Cyc. Code Civ. Proc., § 1191.]

A B
v.
G H

To Whom It may Concern.

Notice is hereby given, That I, A B, of the city and county of San Francisco, state of California, have per-

[46] **Text.** See § 364; and "Grading and Other Work," §§ 139 et seq., ante.

formed labor and furnished materials in filling in and grading the lot hereinafter described in the incorporated city of San José, county of Santa Clara, state of California, and sought to be charged with the lien hereby claimed, and more particularly described as follows, to wit: —— [insert description].

That G H is the name of the owner of said lot, and that said G H caused said lot to be graded, filled in, and improved as herein stated.

That G H is the name of the person by whom I was employed, and to whom I furnished said materials as herein stated.

That said labor was performed and materials furnished at the special instance and request of said owner, G H, between the first day of March, 1898, and the tenth day of March, 1898, and the following is a statement of the terms, time given, and conditions of the contract under which the same was performed and furnished, to wit: On the first day of March, 1898, I agreed to fill in with sand, and grade to the official grade of said street, the said lot within twenty days from said date, and said G H agreed to pay me therefor the sum of two hundred dollars, in gold coin of the United States, within ten days after the completion thereof, or on the completion thereof, less five per cent discount, at my option.

That said contract has been fully performed on my part, and the same was completed, and said filling, grading, and improvement was completed, on the tenth day of March, 1898, and thirty days have not elapsed since the same was completed, and since said sum became due and payable.

That the following is a statement of my demand, after

See notes to Forms Nos. 23 and 24, ante.

Alaska. See Civ. Code, § 269.

Idaho. See Sess. Laws 1899, p. 147, § 3.

Montana. See Code Civ. Proc., § 2130.

Nevada. See Cutting's Comp. Laws, § 3882.

New Mexico. See Comp. Laws, § 2218.

Oregon. See Bellinger and Cotton's Ann. Codes and Stats., §§ 5647, 5663.

Washington. See Pierce's Code, § 6104.

deducting all just credits and offsets: The sum total of said contract price, to wit, two hundred dollars, in gold coin of the United States, after deducting all just credits and offsets, no part of which has been paid [although more than ten days have elapsed since said completion].

Wherefore [conclude as in Form No. 23]. A B

[Verification as in Form No. 24.]

Form No. 30. Owner's Notice to Contractor to Defend Lien Suits.[47]

[Kerr's Cyc. Code Civ. Proc., § 1193.]

To Mr. A B.

Sir, — You will please take notice that an action has been commenced against me in the superior court of the state of California, in and for the city and county of San Francisco, by C D, as plaintiff, and in his complaint therein said C D claims a lien on the property and building which you have, under agreement between us, been constructing for me, situate on F Street, in said city and county, for materials furnished and labor performed by him for you in the construction of said building, to the amount of one thousand dollars. I hereby require you to defend said action at your own expense; and notify you that I will withhold payment of any amount to become due under our said contract during the pendency of said action; and in case of judgment against me or said property upon the said lien, I shall deduct from any amount due or to become due by me to you, the amount of such judgment, costs, and expenses, and will hold you liable for any excess.

Dated this ——— day of ———, 19—.

[47] **Alaska.** Similar form: See Civ. Code, § 272.
Arizona. Similar form: See Rev. Stats. 1901, § 2901.
Idaho. Similar form: See Sess. Laws 1899, p. 148, § 10.
Nevada. Similar form: See Cutting's Comp. Laws, § 3890.
New Mexico. Similar form: See Comp. Laws, § 2227.
Oklahoma. Similar form: See Rev. & Ann. Stats., (4822) § 624.
Oregon. Similar form: See Bellinger and Cotton's Ann. Codes and Stats., § 5650.
Washington. Similar form: See Pierce's Code, § 6111.
Wyoming. Similar form: See Rev. Stats., § 2906.

Form No. 31. Release of Lien.[48]

Know all men by these presents, That I, A B, of the city and county of San Francisco, state of California, for and in consideration of the sum of five hundred dollars, gold coin of the United States of America, to me in hand paid by C D, of the same place, have released and forever discharged, and by these presents do release and forever discharge, the said C D from any and all liability under and by virtue of that certain claim of lien, heretofore, to wit, on the third day of February, 1908, filed in the office of the county recorder of the city and county of San Francisco, state of California, and recorded in liber five of liens, at page 601, and do hereby forever release and discharge any lien thereby claimed, or arising out of the transaction therein set forth; and in consideration of the premises I do hereby further release and discharge the property in said claim of lien described from any and all claims and demands of whatsoever nature.

In witness whereof, I have hereunto set my hand and seal this fifth day of February, A. D. 1908. A B [Seal]

Witness: X Y.

Form No. 32. Complaint for Foreclosure of Lien.[49] **Original contractor, under non-statutory original contract.** (This form may be used for owner's material-man or laborer, mutatis mutandis.)

In the Superior Court of the State of California, in and for the City and County of San Francisco.

A B,
Plaintiff,
v.
G H, O P, R S, and T U,
Defendants.

Plaintiff complains of defendants, and for cause of action alleges:

[48] Form, composition agreement to release contractor and building; construed: See Schroeder v. Pissis, 128 Cal. 209, 211, 60 Pac. Rep. 758.

[49] **Text.** See "Complaint," §§ 670 et seq., ante.

1. That at all the times herein mentioned defendant G H was and now is the owner of the real property hereinafter described.

2. That on the first day of March, 1898, plaintiff and the defendant G H entered into an agreement, in writing, whereby plaintiff agreed to furnish the material and construct for the said defendant G H a certain building upon the lands hereinafter described, and that the said defendant G H agreed to pay him therefor the sum of nine hundred dollars, in gold coin of the United States, upon completion thereof [or as the case may be], a copy of which said agreement is hereto attached, marked "Exhibit A," and made a part hereof.

3. That plaintiff completed said building, under the terms of said contract, on the tenth day of May, 1898, and that he has fully kept and performed the said agreement in all things, and has performed all conditions precedent therein on his part to be kept and performed.

4. That said defendant G H has not paid the said sum of nine hundred dollars mentioned in said agreement, nor any part thereof, although plaintiff has often demanded payment thereof from said defendant G H.

5. That the lands upon which said building was so erected under said contract are described as follows, to wit: ——— [insert description, such as would be proper upon foreclosure of mortgage].

6. That the same is and includes the land required for the convenient use and occupation of said building.

7. That the plaintiff began to furnish the materials for said building, and to perform said labor thereon, under said contract, on the second day of March, 1898, and that all said material was furnished for and actually used in the construction of said building.

8. That thereafter, and within ninety days after the completion of said contract and of said building, and within

This form may be adapted for use in Alaska, Oregon, Idaho, and Nevada.

Colorado. Also allege service of notice of intention to file claim.

Washington. Form, general statement of the requirements of the complaint under act of March 6, 1897, giving laborers a general lien on all property of certain corporations, etc.: See Fitch v. Applegate, 24 Wash. 31, 64 Pac. Rep. 147.

ten days after the filing in the office of the county recorder of said city and county of a notice of completion thereof by the owner of said property [or, set forth facts showing that the claim was filed within the statutory time], to wit, on the twentieth day of May, 1898, plaintiff filed for record with the county recorder of said city and county his claim of lien, in writing, a copy of which is hereto annexed, marked "Exhibit B," and made a part hereof [if it is not desired to annex a copy of the claim of lien, state "that the same contained a statement of his demand, and the amount due to plaintiff for said labor, and materials furnished for and actually used in the construction of said building, as aforesaid, after deducting all just credits and offsets"; and the name of the owner of said premises, and the name of the person who employed plaintiff and to whom plaintiff furnished said materials; and a statement of the terms, time given, and conditions of said contract, with a description of the said property to be charged with said lien, sufficient for identification; or, set forth the facts required to be stated in the claim of lien, by the statute]; and that said claim of lien was verified by the oath of plaintiff, subscribed and sworn to before M B, a notary public in and for said city and county, and that said notary public then certified to said oath under his hand and seal of office, and that said oath was attached to said claim of lien and filed therewith, and thereafter, on said day, said claim of lien and oath were recorded by said recorder in the office of said recorder, in a book kept by him for that purpose, to wit, in liber 58 of liens, at page 62; and that ninety days have not elapsed since the filing of said claim of lien for record, as aforesaid [or, set forth facts showing that the suit has been commenced within the statutory time].

9. That plaintiff has paid, as necessary expenses for verifying said claim of lien, the sum of fifty cents, and for filing and recording the same the sum of three dollars.

10. That the sum of one hundred and fifty dollars is a reasonable attorney's fee to be allowed to plaintiff in this action in the superior court. [Where attorneys' fees are not allowed, the allegation should, of course, be omitted.]

11. That the defendants O P, R S, and T U have, or claim to have, some interest in or lien upon said premises, but that all such claims or liens are subject and subsequent to the lien of plaintiff, as aforesaid.

Wherefore, plaintiff prays:

1. For judgment against said defendant G H for said sum of nine hundred dollars, in gold coin of the United States, and interest thereon from the tenth day of May, 1898, at the rate of seven per centum per annum, and costs of this suit.

2. That the court decree that the plaintiff has a lien upon said building, and upon all the land herein described, for said sum of nine hundred dollars, in gold coin of the United States, with interest thereon from the tenth day of May, 1898, at the rate of seven per centum per annum, together with plaintiff's costs of suit [where attorneys' fees are allowed, add: "including one hundred and fifty dollars as reasonable attorneys' fees," or the statutory limit], and three dollars and fifty cents, the expense of verifying and recording said claim of lien.

3. That all said real property and the building thereon be sold under the order and decree of this court, according to law, and the proceeds thereof applied to the payment of the sum found due to plaintiff, as aforesaid, including the costs, expenses [and attorneys' fees] aforesaid, and that plaintiff may have execution against said defendant G H for any deficiency which may arise after the said application of said proceeds.

4. That the interests, estates, or claims of all the defendants, and each of them, in, to, or upon all said building and real property, and every part thereof, be adjudged to be subsequent and subject to the plaintiff's lien, as aforesaid; and that the equity of redemption of each and every of said defendants in and to said premises, and every part thereof, be forever barred and foreclosed.

5. That plaintiff, or any other party to this action, may become purchaser at said sale.

6. That plaintiff may have such other, further, or different relief as may be proper and equitable in the premises.

[Verification.] ——, Attorney for Plaintiff.

Form No. 33. Complaint for Foreclosure of Original Contractor's Lien, under Statutory Original Contract.[50]

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1. [Same as paragraph 1, Form No. 18.]

2. That on the first day of March, 1898, plaintiff and the defendant G H entered into an agreement, in writing, subscribed by plaintiff and said defendant, whereby the plaintiff agreed to furnish the material and construct for the said defendant G H a certain three-story brick building upon the lands hereinafter described, and that the said defendant agreed to pay plaintiff therefor the sum of ten thousand dollars, in gold coin of the United States, in instalments, at specified times, after the commencement of the work [stating them; or, "on completion of specified portions of the work," or, "on the completion of the whole work," as the case may be], and that, under said contract, twenty-five per cent of the whole contract price was made payable thirty-five days after the final completion of said contract, a copy of which is hereto annexed, marked "Exhibit I," and made a part hereof.

3. That before work under said contract was commenced, said contract [or, if a memorandum was filed, state, "a memorandum of said contract," setting forth the said names of all the parties to said contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments were to be due and payable] was filed in the office of the county recorder of said city and county, where said property is situated.

[Insert other allegations, as in Form No. 32, paragraphs 3 to 11, inclusive, including prayer and verification.]

[50] This form may be adapted for use in Colorado. See preceding form.

Text. See "Complaint," §§ 670 et seq., ante; "Statutory Original Contracts," §§ 269 et seq., ante.

Form No. 34. Complaint of Lien-holder for Grading or Improving Lot in Incorporated City.[51]

[Kerr's Cyc. Code Civ. Proc., § 1191.]

[Title of court and cause.]

Plaintiff complains of defendant, and alleges:

1. That at all the times herein mentioned defendant G H was and now is the owner of the real property situate in the city and county of San Francisco, state of California, and more particularly described as follows, to wit [description].

2. That the city and county of San Francisco, herein mentioned, is an incorporated city under the laws of the state of California.

3. That heretofore, to wit, on the second day of January, 1899, at said city and county of San Francisco, state of California, plaintiff entered into a contract, in writing, with the defendant to grade the said lot [here give terms of contract, and describe the work, so as to bring it within the provisions of section eleven hundred and ninety-one of the Code of Civil Procedure].

4. That, under said contract, said defendant agreed to pay plaintiff one thousand dollars, in United States gold coin, for said grading.

5. That plaintiff fully performed and completed said grading in accordance with the terms of said contract, on the twentieth day of January, 1899.

6. That plaintiff demanded of said defendant said sum of one thousand dollars, but that said defendant has not paid the same, nor any part thereof.

7. That, within sixty days after the completion of said contract, to wit, on the thirtieth day of January, 1899, plaintiff filed for record with the county recorder of said city and county, his claim of lien [continue as in paragraphs 8-11, Form No. 32].

[Prayer as in Form No. 32.]

[Verification.] ——, Attorney for Plaintiff.

[51] **Text.** See "Nature of Labor," §§ 139 et seq., ante.

This form may be adapted for use in Alaska, Idaho, Montana, Nevada, New Mexico, Oregon, and Washington.

Form No. 35. Complaint for Foreclosure of Subclaimant's Lien.[52]

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1. [Same as paragraph 1, Form No. 32.]

2. That on or about the first day of March, 1898, the defendant A B and defendant G H entered into a contract in writing. [Set out contract as in Form No. 32, paragraph 2, if the contract is non-statutory. If the agreed contract price was more than one thousand dollars, and the contract was valid, follow paragraph 2, Form No. 33. If the original statutory contract was void, also set forth the fact showing its invalidity.]

3. That said defendant A B completed said building, under the terms of said original contract, on the tenth day of May, 1898 [continue as in paragraph 3, Form No. 32].

4. That said defendant owner, G H, has paid the said defendant contractor the sum of six hundred dollars, under said contract, and that the sum of four hundred dollars still remains due and unpaid, under the terms thereof. [If facts showing the invalidity of the original contract have been pleaded, this allegation is unnecessary.]

5. That on or about the tenth day of March, 1898, plaintiff sold, delivered, and furnished to said original contractor, defendant A B, twenty thousand feet of one-by-four flooring, of the agreed value of four hundred dollars, for and to be used in the construction of said building, and that all of said flooring was actually used in the construction thereof [or, in the case of a subcontractor, set forth the terms of the subcontract, and allege performance].

6. [If a notice has been served on the owner under the provisions of section eleven hundred and eighty-four of the Code of Civil Procedure, allege facts showing such service, and the amount then due from the owner to the contractor, and the amount thereafter due. If facts showing the invalidity of the original contract have been pleaded, these allegations are unnecessary.]

[52] **Text.** Subclaimants: See §§ 43, 66 et seq., ante.

7. That plaintiff demanded said sum of four hundred dollars from said defendants A B and G H, but that they have, and each of them has, neglected to pay the same, or any part thereof.

8. [Insert paragraph 5, Form No. 32.]

9. [Insert paragraph 6, Form No. 32.]

10. [Allege facts showing that the claim of lien was filed within the statutory time. See paragraph 8, Form No. 32.]

11. [Insert paragraphs 9, 10, 11, Form No. 32.]

Wherefore plaintiff prays judgment as follows:

1. For personal judgment against said defendant A B [i. e., party personally liable] for said sum of four hundred dollars [continue prayer, as in Form No. 32].

[Verification.] ——, Attorney for Plaintiff.

Form No. 36. Order of Reference.

[Title of cause.]

This cause being at issue on the complaint of the plaintiff, and the answers of the defendants herein, on motion of X Y, Esq., of counsel for said plaintiff, and by agreement of all the parties hereto filed with the clerk [or, "and it appearing to the court that the taking of an account is necessary for the information of the court," or as the case may be (**Kerr's Cyc. Code Civ. Proc.**, §§ 638, 639)], —

It is ordered, That this action be referred to V W, Esq., an attorney and counselor of this court, who resides in said city and county, and against whom there is no legal objection, as referee to take the proofs of the respective parties hereto, and report the same to the court; that he also report, for the consideration of this court, a decree founded on the testimony so taken before him, showing the amount, if any, due to the plaintiff from the defendant G H, and also the amounts due to the other defendants, respectively, on the various claims set up by them in their respective answers in this action, the time when their respective demands become liens on the real estate and premises described in plaintiffs' complaint; and the order of rank or priority to which they are respectively entitled in the payment of said respective

claims; also, showing what space of the real estate or land of defendant E F, around the building in said complaint mentioned, is required for the convenient use and occupation thereof; and that he report to this court with all convenient speed.

Dated this ——— day of ———, 1899.

(Signed) ———, Judge of Superior Court.

Form No. 37. Notice by Contractor that He Intends to Dispute Account.

[Arizona Rev. Stats. 1901, § 2900; Wyoming Rev. Stats., § 2877 (mines).]

To ——— (owner of the premises hereinafter described).

You will please take notice, That the undersigned contractor intends to dispute the claim and account heretofore served upon you by ——— for the sum of ——— dollars for ["materials," or, insert nature of claim], alleged to have been furnished for or done upon the property hereinafter described. The following is a description of the premises referred to: ——— [insert description]. ———

Dated ———.

Form No. 38. Findings and Decision.[53] Foreclosure of lien of owner's material-men, partners, on two houses, property sold during construction.

[Title of court and cause.]

This cause having been regularly called for trial before the court (a jury trial having been expressly waived by stipulation of the respective parties made in open court and entered in the minutes), R S appearing as attorney for plaintiffs, and T U appearing as attorney for defendant J L G. And the court having heard the proofs of the respective parties and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

[53] **Text.** See "Findings," §§ 885 et seq., ante.

Arizona. Form, findings of fact and conclusions of law, in substance; suit to foreclose miner's lien: See Griffin v. Hurley, 7 Ariz. 399, 65 Pac. Rep. 147.

Findings of Fact.[54]

1. That the plaintiffs, J H and A M, at all the times herein mentioned, were, and now are, copartners, doing business at said city and county, under the firm name and style of H & M.

2. That at all the times said plaintiffs and L L entered into the contracts hereinafter mentioned, and at all the times plaintiffs commenced to furnish, and did furnish, the lumber and materials, as hereinafter stated, one L L was the owner and reputed owner of those certain lots, pieces. or parcels of land situate, lying, and being in said city and county of San Francisco, state of California, and more particularly bounded and described as follows, to wit: —— [here insert description].

3. That on December 7, 1906, said L L divided said lands into two equal parcels, and commenced the erection of a certain building or structure, and did erect a certain building or structure, upon each of said parcels, and the following is a description of said parcels of land, owned, as aforesaid, by said L L, including the land, and the same is the land, required for the convenient use and occupation of said respective buildings or structures: —— [insert description of each parcel separately].

4. That, at the time of the commencement of this action, said defendant J L G was the owner of said lots and pieces of land and the improvements thereon; and that on the twentieth day of March, 1907, the said L L conveyed said pieces and parcels of land and the improvements thereon to said defendant J L G, and said defendant ever since has been and now is the owner thereof.

5. That on the seventh day of December, 1906, the plaintiffs, J H and A M (copartners doing business under the firm name and style of H & M), and said L L, entered into a contract, whereby said L L bought from said copartners, H & M, and said copartners, H & M, then furnished and delivered to said L L sixty-six thousand seven hundred and fifty shingles, and it was then and there agreed that as many of said shingles as would be necessary were to be furnished

[54] Text. See "Questions of Law and Fact," §§ 827, 828, ante.

for use in the construction of, and were to be used in about equal quantities on, each of the two buildings or structures hereinbefore described, and of said sixty-six thousand seven hundred and fifty shingles, thirty-eight thousand and fifty-four shingles, or nineteen thousand and twenty-seven on each of said buildings or structures, were actually used in, and were necessary for the construction of, said buildings or structures; and that the reasonable value of said shingles, per thousand, is, and was at said time, the sum of one dollar and sixty cents; that is to say, that said shingles, of the reasonable value of thirty dollars and forty-four cents, were used on each of said buildings or structures, as aforesaid, or of the total reasonable value of sixty dollars and eighty-eight cents on the whole of the premises above described; and said L L agreed to pay for said shingles sixty days after the said delivery thereof; and that the time of payment thereof had passed.

6. That plaintiffs fully and duly performed all the conditions on their part in the said contract, but that said L L has not paid said sum, nor any part thereof, and that the whole thereof, to wit, said sum of sixty dollars and eighty-eight cents, is now due and owing, and since the sale thereof has been due and owing, from said L L, over and above all just credits and offsets; and that no part of said sum, or of any moneys to be paid to plaintiffs under said contract, has been paid.

7. That on December 28, 1893, the plaintiffs, J L and A M (copartners, doing business under the firm name and style of H & M), and said L L, entered into a contract, whereby said L L bought from said copartners, H & M, and said H & M then sold, furnished, and delivered to said L L, twenty thousand feet of one-by-four flooring, and it was agreed, at the time of making said contract, that as much of said twenty thousand feet of said flooring as would be necessary in the construction of said buildings was to be furnished and used in said buildings or structures above described; and said L L agreed to pay plaintiffs for the same at the end of sixty days after said delivery; that of said twenty thousand feet of flooring, thirteen thousand five

hundred feet, or six thousand seven hundred and fifty feet on each of said buildings, were actually used in the construction thereof, and were necessary for the construction thereof, and that the reasonable value of said flooring per thousand feet, at said time, was the sum of twenty dollars; that is to say, that flooring, as aforesaid, of the reasonable value of one hundred and thirty-five dollars was used on each of said buildings or structures, as aforesaid, or of the total reasonable value of two hundred and seventy dollars on the whole of the premises above described; and that the time for the payment of said sum has passed.

8. That plaintiffs fully and duly performed all the conditions on their part on the said contract; but that the said L L has not paid said sum, nor any of said sums, nor any part thereof, and that the whole thereof, to wit, the sum of two hundred and seventy dollars, is now due and owing from said L L, over and above all just credits and offsets, and that no part of said sums, nor any moneys to be paid to plaintiffs under said contract, has been paid.

[Here insert other findings, similar to 4 to 8, for other material sold and delivered.]

9. That all the lumber and shingles herein stated to have been sold and delivered by plaintiffs to said L L were delivered to said L L on the dates on which the same are herein respectively stated to have been sold to said L L.

10. That no part of the interest on any of the moneys herein mentioned has been paid.

11. That said buildings and structures were, and each of them was, completed and finished by said L L on the thirtieth day of April, 1907.

12. That thereafter, and within thirty days next after the completion of said buildings and structures, and each of them, to wit, on the twenty-eighth day of May, 1907, the plaintiffs, J H and A M, as copartners, doing business as aforesaid under the firm name and style of H & M, filed for record and recorded with the county recorder of the city and county of San Francisco, state of California, that being the county wherein said land was situated, as aforesaid, their claim and notice of lien in writing, containing a statement

of their demand, and the amount due them on each of said buildings, as hereinbefore set forth, for materials furnished for and actually used in the construction of each of said buildings, at the instance of said L L, as aforesaid, after deducting all just credits and offsets, and containing in said claim of lien the name of the owner and reputed owner of said premises at the time of furnishing and use of said materials, as aforesaid, to wit, L L, who was then the owner and reputed owner of said premises; and containing also the name of the reputed owner at the time of filing said lien for record, as aforesaid, to wit, J L G, the defendant, and that said J L G was then the reputed owner of said premises; and containing also the name of the person to whom said materials were furnished, to wit, L L; and that said claim of lien also contained a statement of the terms, time given, and conditions of each of said contracts, and they were the same as hereinbefore set forth; and that said claim of lien also contained a description of the property to be charged with said lien, sufficient for identification, and that said description was the same as the description first herein set forth; and that said claim of lien was verified on behalf of said firm, at said city and county, by the oath of said A M, one of said plaintiffs, and was subscribed and sworn to before M B, a notary public in and for said city and county of San Francisco, who then certified to said oath, under his hand and seal of office; and that said oath was attached to said claim of lien and filed and recorded therewith; and thereafter said claim of lien and oath were recorded by the county recorder of said city and county, in the office of said recorder, in a book kept by him for that purpose, in liber 58 of liens, at page 62; and that ninety days had not elapsed since said claim of lien was filed for record, as aforesaid, before the commencement of this action; and that said claim of lien was duly recorded and was in due form as required by law.

13. That plaintiffs have paid as necessary expenses for verifying said claim of lien the sum of fifty cents, and for filing and recording the same the sum of five dollars and fifty cents, or a total of six dollars.

14. [Where attorneys' fees are properly allowable under the statute, insert:] That the sum of one hundred dollars is a reasonable attorney's fee to be allowed to plaintiffs in this action for legal services in the superior court; and that no part of any of said sums has been paid.

15. That the claim or interest of defendant J L G in or to said premises, and every part thereof, is subject to and subsequent to the lien and claim of plaintiffs, as aforesaid.

16. That the allegations in paragraphs 1, 3, 4, 5, 8, 9, 10, and 12 of the first count, second count, third count, fourth count, and fifth count of plaintiffs' second amended complaint, as amended, are true.

17. That a notice of the pendency of this action was duly filed in the office of the recorder of said city and county on the ——— day of ——— [date of commencement of this action].

Conclusions of Law.[55]

And as conclusions of law, from the foregoing facts, the court now hereby finds and decides:

1. That there is due and owing to plaintiffs, as such copartners, from said L L, the reasonable value of said lumber and materials sold and delivered to him, as aforesaid.

2. That plaintiffs, J H and A M, as copartners under the firm name and style of H & M, have a lien upon said buildings or structures, and the respective pieces of land upon which they and each of them are situate, as aforesaid, for the sums found due upon them as aforesaid, to wit, for the sum of sixty dollars and eighty-eight cents on the first count of said second amended complaint, as amended, on the first contract herein set forth; and for the further sum of two hundred and seventy dollars on the second count or cause of action set forth in said second amended complaint, as amended, upon the second contract set forth herein; and the further sum of two hundred and fifty dollars on the third count or cause of action set forth in said second amended complaint, as amended, upon the third contract set forth herein; and the further sum of ninety-six dollars and fifty-

[55] **Text.** See "Questions of Law and Fact," §§ 827, 823, ante.

five cents on the fourth count or cause of action set forth in the said second amended complaint, as amended, upon the fourth contract hereinbefore set forth; and the further sum of one hundred and sixty-two dollars and forty-seven cents upon the fifth count or cause of action set forth in said amended complaint, as amended, upon the contract lastly hereinbefore set forth; or a lien for the total sum of eight hundred and thirty-nine dollars and ninety cents, together with interest thereon from the first day of May, 1906, at the rate of seven per centum per annum, together with the costs and expenses of verifying, filing, and recording said claim of lien, as aforesaid, to wit, the sum of six dollars [and together with the further sum of one hundred dollars as reasonable attorneys' fees], and together with plaintiffs' costs of suit.

3. That plaintiffs, as such copartners, are entitled to a decree establishing their lien for each and all of said sums upon said parcels of land and the respective buildings thereon; and also decreeing that the whole of each of said respective parcels of land is required for the convenient use and occupation of the respective buildings thereon; and further decreeing that all and singular the premises mentioned herein, or so much thereof as may be sufficient to raise the amount due to plaintiff, which is herein found to be a lien upon said premises, for principal and interest [attorneys' fees], expenses, costs of suit, and the expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction, by the sheriff of said city and county; that the said sheriff give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff, or any of the parties to this suit, may become the purchaser at such sale; and that the said sheriff, after the time allowed by law for redemption, execute a deed to the purchaser or purchasers of said premises on said sale; and further decreeing that said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiffs, or their attorney, out of

said proceeds, his costs in this suit, and the moneys found to be a lien upon said premises hereinabove set forth, with interest thereon from the date of said decree, at the rate of seven per centum per annum, or so much thereof as said proceeds of sale will pay of the same; and further decreeing that the defendant, and all persons claiming or to claim from or under him, and all persons having or claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with said recorder, and subsequent to the commencement of this suit, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said premises, and every part and parcel thereof, from and after the delivery of said sheriff's deed; and further decreeing that the purchaser or purchasers of said premises at such sale be let into possession thereof; and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers, on production of the sheriff's deed for such premises or any part thereof.

And judgment is hereby ordered to be entered accordingly.

Dated this ——— day of April, 1907.

(Signed) ———, Judge of Superior Court.

Form No. 39. Decree.[56] Foreclosing Lien of Material-men, Copartners, on Two Buildings, Property Sold during Construction.

[Title of court and cause.]

This cause coming on regularly for trial on the eleventh, twelfth, and thirteenth days of February, A. D. 1907. R S appearing as counsel for plaintiffs, and T U appearing as counsel for defendant J L G, said cause having been duly dismissed as to all the defendants except said defendant

[56] **Text.** See "Decree." §§ 903 et seq., ante.

Colorado. Form, mandatory part of decree foreclosing lien: See Marean v. Stanley, 34 Colo. 91, 81 Pac. Rep. 759.

J L G, a trial by jury having been duly and expressly waived by counsel for the respective parties; and it appearing that notice of the pendency of this action was duly filed in the office of the recorder of said city and county, and the court having heard the testimony and proofs, and the evidence being closed, and the court having heard the argument of counsel, the cause was submitted to the court for consideration and decision; and after due deliberation thereon, the court delivers its decision and findings in writing, which is filed herein, and orders that judgment be entered in accordance therewith.

Wherefore, By reason of the law and the findings aforesaid, and upon motion of R S, attorney for plaintiffs, —

It is ordered, adjudged, and decreed, That there is due and owing to plaintiffs, J H and A M, as copartners, doing business under the firm name and style of H & M, from L L, the reasonable value of lumber and materials sold and delivered to said L L by said plaintiffs, as shown in said findings herein; and

It is further ordered, adjudged, and decreed, That said plaintiffs, J H and A M, as copartners, doing business under the firm name and style of H & M, have a lien upon the buildings and structures, and the respective pieces of land upon which they and each of them are situate, and upon the whole thereof, as in the complaint and hereinafter described, for the sum of sixty dollars and eighty-eight cents on the first count or cause of action set forth in the second amended complaint, as amended; and for the further sum of two hundred and seventy dollars on the second count or cause of action set forth in said second amended complaint, as amended; and for the further sum of two hundred and fifty dollars on the third count or cause of action set forth in said second amended complaint, as amended; and for the further sum of ninety-six dollars and fifty-five cents on the fourth count or cause of action set forth in said second amended complaint, as amended; and for the further sum of one hundred and sixty-two dollars and forty-seven cents upon the fifth count or cause of action set forth in said second amended complaint, as amended; and a lien for each of said

amounts upon both and each of said parcels of land, and the respective structures thereon; and also a lien for the sum total thereof, to wit, the sum of eight hundred and thirty-nine dollars and ninety cents ($839.90), upon the whole of said premises, together with interest thereon [57] from the first day of May, A. D. 1906, at the rate of seven per centum per annum, together with the further sum of six dollars expenses of verifying, filing, and recording plaintiffs' claim of lien herein [together with the further sum of one hundred dollars, reasonable attorneys' fees herein],[58] or the sum total of one thousand and sixty-one dollars and thirty-four cents, together with plaintiffs' costs of suit herein, all of which constitute a lien on said premises as aforesaid.

And it is further ordered, adjudged, and decreed, That the whole of each of said respective parcels of land is required for the convenient use and occupation of the respective buildings thereon;

And it is further ordered, adjudged, and decreed, That all and singular the premises hereinafter described, or so much thereof as may be sufficient to raise the amount due to plaintiffs, which is herein decreed to be a lien upon said premises, for principal and interest, attorneys' fees, expenses and costs of suit, including the expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by the sheriff of said city and county, according to law; that said sheriff give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales on real estate under execution; and that the plaintiffs, or any of the parties to this suit, may become the purchasers at such sale; and that the said sheriff, after the time allowed by law for redemption, execute a deed to the purchaser, or purchasers, of said premises on said sale; and that said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiffs, or their attorney, out of said proceeds, their costs in this suit, and the moneys found to be a lien upon

[57] **Text.** See "Interest," §§ 907 et seq., ante.
[58] **Text.** See "Attorneys' Fees," §§ 935 et seq., ante.

said premises, as hereinabove decreed, with interest thereon from this date, at the rate of seven per centum per annum, or so much thereof as said proceeds of sale will pay for the same; and that the defendant, and all persons claiming or to claim from or under him, and all persons having or claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with said recorder, and subsequent to the commencement of this suit, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said premises, and every part and parcel thereof, from and after the delivery of said sheriff's deed; and that the purchaser or purchasers of said premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, has come into possession under them, or either of them, deliver possession thereof to such purchaser or purchasers on production of the sheriff's deed for such premises, or any part thereof.

The following is a description and particular boundaries of the property authorized to be sold under and by virtue of this decree: All those certain lots, pieces, and parcels of land situate, lying, and being in the said city and county of San Francisco, state of California, and more particularly described as follows, to wit: —— [insert separate description of each parcel].

Dated this twenty-second day of April, 1907.

(Signed) ——, Judge of the Superior Court.

Form No. 40. Satisfaction of Judgment.

[Title of court and cause.]

For and in consideration of the sum of one thousand two hundred dollars ($1,200), gold coin of the United States, to me in hand paid by J L G, defendant in the above-entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in said superior court, in said action, on the twenty-second day of April, 1907, in favor of plaintiffs

J H and A M, copartners, doing business under the firm name of H & M, and which was adjudged to be a lien upon the property in the complaint in this action described, for the sum of one thousand and sixty dollars, and one hundred and forty dollars, costs and disbursements and percentage; which said judgment was recorded in book 31 of judgments, at page 236; and I hereby authorize and direct the clerk of said court to enter satisfaction of record of said judgment in said action.

Dated this ninth day of May, 1907.

——, Attorney for Plaintiff.

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